# 92-337

No._____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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MELODY PERKINS, Petitioner

vs.

GENERAL MOTORS CORPORATION, Respondent
IN RE: MELODY PERKINS;
GWEN G. CARANCHINI, Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

I. DID THE EIGHTH CIRCUIT CORRECTLY HOLD IN DENYING PETITIONERS' WRIT OF MANDAMUS THAT ARTICLE III OF THE CONSTITUTION DOES NOT REQUIRE THE SETTING ASIDE OF AN INTERLOCUTORY ORDER OF SANCTIONS WHEN THE PARTIES RESOLVED THEIR PRIVATE CONTROVERSY AND THE TRIAL COURT HAS NOT SUA SPONTE ENTERED SANCTIONS NOR EXERCISED ITS INHERENT POWER TO IMPOSE SANCTIONS?

II. DID THE EIGHTH CIRCUIT DENY PETITIONERS THEIR RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT BY AFFIRMING THE GRANT OF SANCTIONS AGAINST THEM WITHOUT AFFORDING PETITIONERS AN OPPORTUNITY TO BRIEF THE UNDERLYING SANCTIONS?

## LIST OF THE PARTIES

The parties to the proceedings below were Melody E. Perkins, plaintiff and appellant below; Gwen G. Caranchini, counsel for Melody Perkins and sanctioned by the court; General Motors Corporation defendant below; The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri, Western Division, upon whom the Writ of Mandamus was served.

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## OPINIONS BELOW

The Order of the United States District Court for the Western District of Missouri granting Sanctions to General Motors on General Motors' Motion for Sanctions is reprinted in the Appendix hereto, pp. A-1 to A-72, infra.; the Order of the United States District Court for the Western District of Missouri denying the Parties and Gwen G. Caranchini's Joint Motion to Set Aside the Sanctions is reprinted in the Appendix hereto, pp. B-1 to B-2, infra.; the Order of the Eighth Circuit Court of Appeals denying Melody Perkins and Gwen G. Caranchini's Writ of Mandamus and affirming the sanctions entered by the District Court is reprinted in the Appendix hereto, pp. C-1 to C-23, infra.

## JURISDICTION

Petitioners Melody Perkins and Gwen G. Caranchini (hereinafter referred to as Petitioners) seek review of the May 22, 1992 Order of the United States Court of Appeals for the Eighth Circuit denying their Writ of Mandamus and affirming the sanctions entered against them by the District Court on February 26, 1990.

The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the Eighth Circuit is invoked under 28 U.S.C. Sec. 1254(1).

# CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF CIVIL PROCEDURE

## Article III

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States * * *; * * * to controversies * * * between citizens of different States * * *.

## Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, which due process of law; nor shall private property be taken for public use, without just compensation.

F.R.Civ.P. 11
Signing of Pleadings, Motions, and
Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion ore other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person

who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

### A. Procedural History of the Case and Disposition of the Case Below

This case arose from Title VII and common law actions against General Motors Corporation for sexual harassment of Melody Perkins, one of appellants herein and hereinafter referred to as "Perkins", by a managerial employee of General Motors, hereinafter referred to as "GM". The District Court granted summary judgment on Perkins's common law claims against GM prior to trial, and then proceeded to hear without a jury the Title VII action. In April of 1989, the District Court found against Perkins. An appeal was prosecuted by Perkins and her Title VII action was

affirmed, but her common law claims were remanded for trial by jury in 1990. Immediately after the entry of Judgment in April of 1989, GM instituted a Motion for Sanctions against Perkins and her counsel Gwen G. Caranchini, hereinafter referred to as Caranchini. As of the time of remand of the common law action against GM, the District Court had granted GM's Motion for Sanctions but had not reduced the sanction to an award of attorneys' fees in GM's favor. At no time did the District Court sua sponte move for sanctions, join with GM in its Motion for Sanctions, or seek to impose any sanctions under any theory or right.

When the case was remanded and set for a jury trial in August of 1991, the District Court set the hearing on the sanctions amount, but that hearing was never concluded. Prior to the last day of

hearings on the sanction amount, GM settled with Perkins on her claims and with Perkins and Caranchini on the sanctions agreeing to move to vacate the award of sanctions and not to collect any attorneys' fees. Thereafter, as part of that settlement, GM moved jointly with Perkins and Caranchini to vacate the District Court's order of February 26, 1990 granting GM's Motion for Sanctions. The District Court denied this Motion by order of July 5, 1991. The Court did not then sua sponte re-impose the sanctions. On July 7, 1991 the District Court entered orders of dismissal of the underlying litigation.

On August 2, 1991 Perkins and Caranchini filed a Notice of Appeal from the February 26, 1990 order granting sanctions as well as the July 5, 1991 order denying the parties' request to vacate the February 26, 1990 order.

On August 15, 1992 the Eight Circuit Court of Appeals set a briefing schedule on the underling appeal, including a time for ordering of the transcript. On August 21, 1991 Perkins and Caranchini sent to the Court of Appeals their Motion for Stay of Briefing on the underlying sanctions pending resolution of appellants' Writ of Mandamus which sought to require the District Court to set aside the sanction order as it lacked jurisdiction. That Motion made specific mention of the fact that Perkins and Caranchini would need the transcript not only of the sanction hearing but perhaps of parts of the underlying trial in order to properly prepare their brief on appeal on the issue of sanctions. That Motion also noted that a favorable resolution of the Writ would not require briefing on the sanction issue.

The Eighth Circuit Court of Appeals entered its Order August 23, 1991 which stated:

> ". . . This appeal shall be held in abeyance pending the filing and disposition of appellant's application for writ of mandamus."

On September 19, 1991 Perkins and Caranchini filed their Writ of Mandamus. Thereafter, the Eighth Circuit directed GM to file a response to the Writ, and such was filed October 24, 1991. In that response GM moved the Eighth Circuit for an order dismissing them from the appeal as they had resolved their differences with Perkins and Caranchini.

On November 14, 1991, the Eighth Circuit entered its Order setting the briefing on the Writ of Mandamus, dismissing GM and requesting the United States Attorney to enter its appearance for the trial court. That order, although

indicating consolidation of the cases, did not set a time for the ordering of the transcript on the sanction issue, as the August 15, 1991 order had done. The time period for briefing was extremely limited: December 2, 1991 for Petitioners' brief, December 20, 1991 for Respondent's brief and December 31, 1991 for Petitioners' reply brief. No mention whatsoever was made in this Order rescinding the Eighth Circuit's August 23, 1991 order staying the briefing on the underlying sanctions. The case was also set for oral argument on January 9, 1992 and specific mention was made that no extensions of briefing would be given.

Both Petitioners and Respondent below briefed the issues raised by the Petition for Writ. However, neither Petitioners nor Respondent briefed the underlying issue of sanctions. After the briefs were submitted

and prior to oral argument, no request was made by the Eighth Circuit for briefing of the issue of sanctions, although the briefs clearly did not address that issue.

Oral argument proceeded January 9, 1992 before Chief Judge Arnold, and Judges Wollman and Magill. Discussion was had during oral argument regarding the fact that no briefing had yet been done on the sanctions issue and that if the Writ was denied, Petitioners would proceed with the underlying appeal. The United States Attorney stated on behalf of Respondent in her brief and during oral argument that it was only "fair" that such briefing be allowed to proceed because "such an order, even unaccompanied by monetary punishment, can have serious implications for the attorney or party involved."

The Eighth Circuit did not solicit further briefs on the underlying sanctions

after oral argument either before or after Judge Arnold recused himself. No briefing opportunity on these sanctions was ever given Petitioners at any time.

After oral argument, Chief Judge Arnold recused himself and Judge Beam substituted for Judge Arnold. The case was resubmitted on March 11, 1992. The Panel entered its decision May 22, 1992 and this Petition for Certiorari follows after an untimely filed Motion for Rehearing by the Panel or, alternatively, for rehearing en banc.

B. Statement of Facts

The sanctions issued in this matter were done so upon Motion of GM. They were not entered sua sponte by the trial court. Although the trial court in its order granting sanctions indicates it believed Caranchini was the source of the problems in discovery, the trial court at no time

indicated that to be the case during pretrial discovery, the trial of the matter, post trial or until the time of its order in February, 1990. To the contrary the trial court indicated in a pretrial on December 17, 1988 that he was not criticizing Perkins, GM or their counsel for the conduct of the litigation and would inform the attorneys if he believed their conduct to be wrong. (Title VII Doc. No. 202, at p. 66-67) and went so far as to state upon inquiry from Caranchini as to whether she was the cause for any of the court's orders limiting discovery:

> "I'm not attempting to -- if I want to tell you that you've done something wrong I'll come out and tell you directly. And if I want to tell Mr. Kelly and Mr. Yates that I think they've done something wrong I'll tell them directly. I'm not gong to do it by indirection -- sort of expect you to go home and think about it, gee, what did he mean. I'll come out and say it." (Tr. at 70)

Likewise, at no time during the

depositions in his chambers (which included 12 volumes of Perkins' deposition and over two dozen other depositions) or any of the pretrial or discovery conferences was His Honor at all critical of Caranchini or Perkins' handling of this matter or their legal theories as indicated in his Order of Sanctions (at page 10-11). The trial court did not exercise its authority under Rules 11, 26, 28 U.S.C. Sec. 1927 or its inherent power at any time during the course of discovery, during trial, after trial, after its Findings of Fact and Conclusions of Law, or even after the Motion of GM to Withdraw the Sanctions Order of February 26, 1990 to attempt to sanction Perkins or Caranchini. GM never sought sanctions at any time until April 13, 1989 after they had won the case.

Additionally, this Court should consider the trial court's own comments

during a hearing on sanctions on March 1, 1991. As part of its ruling on the reasonableness of the attorneys' fees requested the trial court stated (App. Tab A, Partial Tr. of Proceedings, p.2-3):

> "This case, in my view, is the most complex employment case that I've ever seen. It ranks in complexity with many cases in other areas where the conclusion that the litigation in those areas is complex is much more frequently reached. For instance, it would rank in complexity with a substantial products liability case, with antitrust cases, at least of the type we see in this district. . . . "

Finally, the trial court itself stated on June 26, 1991 with regard to the sanctions (App. Tab B, Tr. p. 3)

> "Well, we'll continue the hearing (on sanctions) scheduled for tomorrow until I see the papers an the motions seeking leave to withdraw the motion for sanctions, and at that time I will decide what to do. Obviously, I can't -- I'm not going to -- unless for some reason there is an objection by the plaintiff I'm not going to -- I don't think I can do anything other than grant General Motors' request to not pursue their motion for sanctions, so that's -- so I'm not suggesting I'm

> not going to grant the motion; it's just that I need to see all the paperwork together so that I can decide what order is appropriate."

However, despite this background the trial court for the first time in almost five years of handling the case indicated to the parties on July 2, 1991 that he had considered imposing sanctions sua sponte, but had not done so. He also indicated that he still was considering issuing such an order:

> ". . . I need to think about this. My initial reaction was that under no circumstances would I withdraw that order, . . . "

However, to this date no sua sponte motion has been entered by the trial court in this matter under rule, statute, or power of the court against Caranchini and/or Perkins.

## REASONS FOR GRANTING WRIT

I. DID THE EIGHTH CIRCUIT CORRECTLY HOLD IN DENYING PETITIONERS' WRIT OF MANDAMUS THAT ARTICLE III OF THE CONSTITUTION DOES NOT REQUIRE THE SETTING ASIDE OF AN INTERLOCUTORY ORDER OF SANCTIONS WHEN THE PARTIES RESOLVED THEIR PRIVATE CONTROVERSY AND THE TRIAL COURT HAS NOT SUA SPONTE ENTERED SANCTIONS NOR EXERCISED ITS INHERENT POWER TO IMPOSE SANCTIONS?

The Eighth Circuit's opinion sidesteps entirely an issue of first impression regarding the jurisdiction of a District Court to impose sanctions: whether a Court may through its discretionary power refuse to set aside an interlocutory order of sanctions requested by a party when the parties have resolved all disputes between them and there is no "case and controversy" before the District Court giving rise to jurisdiction. Put another way, may a District Court, who has not given notice of its adoption of the sanctions requested by

a party, and has affirmatively informed the parties that it will give such notice if it appears there are violations, without any notice to the party sought to be sanctioned as required by Rule and statute, transmute an interlocutory order of sanctions into its own sanctions, by denying a joint request of the parties that the sanctions be set aside as part of a settlement of the parties' disputes. By answering "yes" to these two questions, the Eighth Circuit has found a District Court need not have an "Article III case and controversy" between itself and the party sought to be sanctioned by way of notice to that party of the Court's intention to sanction, in order for the Court to impose sanctions. Rather, a Court, through the exercise of its discretionary powers may, without any "jurisdiction" as <u>required and conferred</u> by the Constitution impose sanctions upon a

party. Such a rule violates the underlying rule giving power to our Courts under Article III of the Constitution. That Article specifically provides that a Court's jurisdiction extends only to matters which present "cases" or "controversies" in the constitutional sense. Moot cases[1] do not fall within this Constitutional proscription of jurisdiction, and neither a Federal Circuit Court of Appeals nor a District Court can decide a question which will not affect the rights of the litigants before it.

This mootness issue is demonstrated

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[1] A case becomes moot when the issues presented are no longer viable or the parties lack a legally cognizable interest in the outcome, Powell v. McCormack, 395 U.S. 486, 496-97, 89 S.Ct. 1944, 1950-51, 23 L.Ed.2d 491 (1969), Kennedy v. Block, 784 F.2d 1220 (4th Cir. 1986), Kandlbinder v. Reagen, 713 F.Supp. 337, 339 (W.D. Mo. 1989) [citing Thomas v. Bennett, 856 F.2d 1165, 1168 (8th Cir. 1988) and Steele v. Van Buren Pub. School Dist., 845 F.2d 1492, 1494 (8th Cir. 1988)].

well by the Kennedy case cited at footnote 1 hereinabove. In Kennedy, Kennedy was a tenant at Gillian Court whose construction was subsidized by funds provided by the FmHA. In 1984 Kennedy received a letter indicated his lease would be terminated and he would be evicted. Kennedy commenced an action in district court, filing a complaint and seeking declaratory and injunctive relief. The court entered a preliminary injunction, but the court later denied a permanent injunction. Kennedy appealed from that final judgment. While the appeal was pending, the case was settled, and Kennedy moved the district court for relief from the judgment as the settlement had provided that Gillian Court had dropped all claims and charges against Kennedy and promised not to seek his eviction. The district court refused to set the judgment aside, and instead

dismissed Kennedy's claims against Gillian Court and ordered that judgment be entered. Kennedy appealed from that order. The court stated at page 1222 et seq:

> Because Kennedy's claims now before us are moot as a result of the settlement of the dispute between Kennedy and Gillian Court, . . . decline to decide the merits of the controversy before us. Our decision is predicated upon the constitutional direction that we resolve only real cases and controversies, . . . .
>
> * * *
>
> As both a constitutional and prudential limitation, therefore, mootness commends our refusal to reach the merits of Kennedy's claims. We vacate the judgment of the district court, with directions that this proceeding be dismissed as moot.

Thus when the Supreme Court or one of the Circuit Courts of Appeal find that a case has become moot, the required "established practice" is to reverse or vacate the judgment below and remand with a direction to dismiss, United States v. Munsingwear, Inc., 340 U.S. 36, 39, 71

S.Ct. 104, 106, 95 L.Ed.36 (1950); United States of America v. National Bank of Commerce, 665 F.2d 1050 (8th Cir. 1985). It is said that this action is the duty of the appeals court, Munsingwear, Inc., supra at 340 U.S. at 39, 71 S.Ct. at 106, 95 L.Ed. 36 (1950); National Bank of Commerce, supra. This is because the effect of vacating the District Court orders on the grounds of mootness removes the undesired res judicata and stare decisis effect of the judgments vacated, the reasoning obviously being that such doctrines should not be attached to "judgments" that are not the result of litigation between parties because Article III Courts are precluded from exercising an advisory role, Martinez v. Winner, 600 F.2d 230 (10th Cir. 1986) [citing United States v. National Bank of Commerce, supra.].

It is clear from the settlement

between Caranchini, Perkins and GM that any sanctions claim of GM is "no longer viable" nor one which is cognizable before any court, since GM has no interest in pursuing that matter in any way. Further, GM has indicated that it has no interest in further participating in this matter even on appeal. Thus, it is clear that Petitioners' Writ to the Eighth Circuit is the only way to address the issue of whether the orders by the District Court should stand, or whether the District Court should be required to vacate the interlocutory order of February 26, 1990, as well as that of July 5, 1991 which refuses to vacate such order of February 26, 1990.

Since the sanctions order of February 26, 1990 was interlocutory and not final, GM, Perkins and Caranchini clearly had the right to have the Motion For

Sanctions dismissed with prejudice and that interlocutory sanctions order vacated as part of the resolution of their "case or controversy". The effect of the District Court's action in refusing to vacate the interlocutory sanctions order after it failed to enter the sanctions sua sponte or "adopt" them in some fashion as its own, was to leave outstanding an "advisory opinion", since there remained no case or controversy between the parties regarding any matter, including the sanctions, and there was no case or controversy between the District Court and Petitioners. This the District Court is without jurisdiction to do under Article III of the Constitution.

The Eighth Circuit in its order stated:

> "As part of the settlement agreement reached the day prior to the sanction hearing, GM withdrew its motion for

> sanctions and joined appellants in a motion to drop the sanction order."

Clearly, such action amounted to GM withdrawing the "case and controversy" before the District Court with regard to sanctions. Having so found, however, the Eighth Circuit did not go on to find that a "case and controversy" remained between the District Court, Perkins and Caranchini when the "case and controversy" between GM, Perkins and Caranchini was eliminated by their dispute resolution. Rather the Eighth Circuit ignored the Constitutional mandate of a "case and controversy" in order for the District Court to retain jurisdiction. The Eighth Circuit then concludes it was "reasonable" for the District Court "to issue the sanction order without the monetary penalty". That statement totally ignores the Constitutional mandate that the District

Court must have "a case and controversy" before it in order to make a "reasonable" decision.

"Reasonableness" does not confer "jurisdiction" under Article III of the Constitution when a case has become "moot". "Reasonable[ness]" has nothing to do with the issue of jurisdiction under Article III. "Mootness" is the issue and one the Eighth Circuit never addresses. Courts can only act "reasonably" when they have the power to act in the first place as granted to them by the Constitution.

Neither Willy v. Coastal Corp., 112 S.Ct. 1076 (1992) nor Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447 (1990) addresses this issue despite the Eighth Circuit's attempt to "fit" Willy into the fact situation. In Willy the issue was whether after the lawsuit was dismissed a District Court retained subject matter

jurisdiction to determine whether a party could be sanctioned for bringing the lawsuit when one of the parties sought the sanction. Clearly, a "case and controversy" existed between the parties over which the District Court exercised jurisdiction.

That is not the instant situation. Here the parties jointly moved to set aside the sanctions because their "case and controversy" regarding the sanctions was fully resolved as well as their "case and controversy" regarding the underlying matter. While Petitioners recognize Courts are public institutions that are, as recognized in Willy, empowered to protect their integrity with appropriate orders, this does not mean that they are authorized to issue orders or opinions or become embroiled in "cases or controversies" that are not pending before them, because

Article III of the Constitution prohibits this. If the District Court had instituted a "case and controversy" between itself and Petitioners by adopting the order previously entered, or exercised its "inherent power" to sanction or the rules allowing it to sua sponte sanction, then there would be jurisdiction. However, none of that occurred. Rather the District Court transmuted the sanctions previously entered at the request of GM into its own, when no case or controversy was extant between either itself and Petitioners, or between Petitioners and GM.

Thus, the Eighth Circuit in affirming the District Court's discretionary power to enter sanctions at all costs has done so at the expense of the Constitutional provision which empowers it in the first place. Just as Petitioners are required to follow this Court's rules, this Court is bound by the

ultimate rule of this land with regard to its power over Petitioners--Article III of the Constitution. Neither the Eighth Circuit nor this Court can ignore that ultimate rule to preserve a "discretionary power" as the Eighth Circuit has so done by its Opinion in this case.

II. DID THE EIGHTH CIRCUIT DENY PETITIONERS THEIR RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT BY AFFIRMING THE GRANT OF SANCTIONS AGAINST THEM WITHOUT AFFORDING PETITIONERS AN OPPORTUNITY TO BRIEF THE UNDERLYING SANCTIONS?

The Eighth Circuit acknowledges in its opinion[2] that Petitioners informed the Court that it had not briefed the issue of sanctions because of the Eighth Circuit's August 23, 1991 order which stayed briefing on the sanctions, but contends it may proceed to address the sanctions anyway

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[2] See footnote 4 of opinion.

because its order of "November 14, 1991 entered an order setting a briefing schedule and oral argument in both case numbers. . . . (the appeal) and . . . (the mandamus petition). The Panel thereafter goes on to "analyze" the sanctions entered by assuming as true all "facts" and "conclusions" reached by the District Court with regard to the sanctions entered, and concluding that those "facts" substantiated the District Court's conclusions, and therefore there was no "abuse of discretion" under Cooter & Gell, 110 S.Ct. at 2461. With that brief footnote and the following assumption of the District Court's correctness, the Eighth Circuit violated Petitioner's due process rights as preserved by the 5th Amendment to the United States Constitution. Petitioners had preserved their right to appeal these underlying sanctions by filing a timely

notice of appeal. The Eighth Circuit had initially provided a time period for the ordering of a transcript. Petitioners upon receipt of that Order indicated in their timely filed Motion for Stay of Briefing a desire to order transcript to rebut the entry of sanctions but only if their Writ of Mandamus was denied. The entry of the Writ would have obviated the necessity for ordering a lengthy transcript and briefing the sanctions issue. That was one of the reasons it was sought in the first place. The Eighth Circuit clearly and unequivocally ordered a stay of briefing on the appeal pending "disposition of the Writ". Additionally, the extremely short briefing schedule and quick time period for setting of oral argument in this case likewise clearly indicated to all the parties that the Writ and not the underlying sanctions was what the Court was

going to determine. The briefs when submitted contained no reference whatsoever to the sanctions. Nothing in Petitioners' Brief or Reply Brief could possibly be considered an abandonment of the underlying appeal. To the contrary as the Panel noted in Footnote 4 of its opinion, Petitioners were under the impression that they would brief the underlying sanctions issue if the Writ was denied. The Eighth Circuit did not indicate in any follow up order that additional briefing was necessary.

Petitioners did not abandon their underlying appeal during oral argument, again mentioning that if the Writ was denied, they wished to brief the sanctions. The Panel hearing oral argument never addressed the issue of the underlying sanctions during oral argument, although argument was lengthy. Nor did the Panel during oral argument indicate in any

fashion that Petitioners would be denied the opportunity to brief the sanctions if the Writ was denied.[3] After the case was orally argued, clearly a review of the briefs by the Panel demonstrated no briefing on the sanctions was done and the clear desire of Petitioners to proceed with the underlying appeal if their Writ was denied. Yet no additional briefing was requested, even if oral argument was to be denied. The Eighth Circuit however has cursorily denied Petitioners their right of appeal by putting a "new twist" on its November 14, 1991 order to accomplish the affirmance of the sanctions. Surely, this

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[3] In fact although oral argument is not always an indication of this Court's ultimate decision on a case, in this case a review of the tape recorded hearing clearly indicates that the Court believed Petitioners' position was correct under the law and were concerned that such sanctions would continue to lie without the opportunity of Petitioners to contest the sanctions!

Court's standard enunciated in Cooter & Gell, supra, that sanctions shall be viewed on an "abuse of discretion" standard does not mean that the parties sanctioned shall not have the opportunity to seek a meaningful appeal from the entry of sanctions. To do so violates every principle of due process as guaranteed by the Fifth Amendment and the Rules of this Court which Petitioners have adhered to in order to preserve their right of appeal.

"Fair play" is the essence of "due process". Galvin v. Press, 347 U.S. 522, 74 S.Ct. 737 98 L.Ed. 911, rehearing denied, 348 U.S. 852, 75 S.Ct. 17, 99 L.Ed. 671 (Cal. 1954). Although this particular issue of "due process" appears to be an issue of first impression in the courts, it perhaps it is because it is a basic tenet of our judicial system that an "accused" has a right of appeal from the decision of

a trial court. That appeal, must be meaningful, and not a mere "rubber stamp" of the trial court's decision (whether by court or jury) if there is to be true "access to the courts". Yet here, Petitioners are effectively denied that "access" by a mere rubberstamping of the trial court's decision on sanctions without any opportunity to demonstrate to the appellate court the erroneous nature of the trial court's decision. The "abuse of discretion" standard adopted by this Court with regard to appellate review of sanctions imposed by the lower court was not meant to be a complete abdication to the lower court's decision. If that is the purpose, then there would be no purpose to an appeal whatsoever. Petitioners believe they should have the opportunity to present their position as to the reasons for the positions taken. To deny them that

opportunity is to deny Petitioners meaningful access to the appellate court.

## CONCLUSION

It is clear that the Eighth Circuit in its opinion of May 22, 1992 has violated two basic tenets of our judicial system:

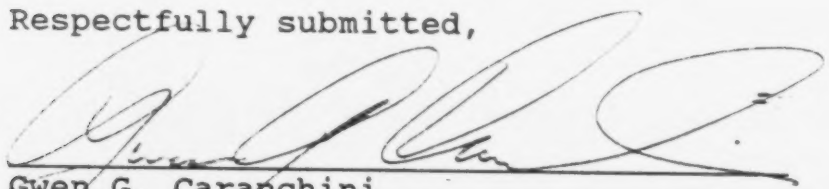
First: that Article III requires there be a "case and controversy" prior to exercise of jurisdiction; and

Second: there is a fundamental fairness in our judicial system as guaranteed by the Fifth Amendment to the United States Constitution.

These violations require this Court to grant certiorari in this matter. Therefore, based upon the above, Petitioners pray that this Court order the District Court to vacate its Order of July 5, 1991 denying Petitioners' and General Motors' Motion To Set Aside Sanction Order of February 28, 1990, and to direct said

United States District Court for the Western District of Missouri to enter its Order dismissing the Motion for Sanctions filed by General Motors Corporation as moot, and alternatively, that Petitioners be permitted to proceed with their appeal from the underlying order of sanctions entered February 26, 1990 by providing them an opportunity to brief the underlying issue of sanctions.

Respectfully submitted,



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Counsel of Record for
Petitioner Melody Perkins and
PRO SE ON BRIEF

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

| | |
|---|---|
| MELODY PERKINS, | ) |
| | ) |
| Plaintiff, | )No. 86-0665-CV-W-9 |
| | )No. 87-0048-CV-W-9 |
| v. | ) |
| | ) |
| GENERAL MOTORS CORP, | ) |
| Defendant. | ) |

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SANCTIONS AGAINST PLAINTIFF AND HER LEAD ATTORNEY AND REQUIRING DEFENDANT TO FILE SUPPLEMENTAL BRIEFING ON AMOUNT OF SANCTIONS

Plaintiff Melody Perkins brought the underlying Title VII claim against General Motors Corporation (G.M.) alleging that she was the victim of both a sexually hostile work environment and quid pro quo sexual harassment. Perkins, an avowed homosexual, claimed that as a condition of her employment she was forced to have sex with Thomas Spivey, the body shop superintendent

and her indirect supervisor, from shortly after she began her employment in 1978 until 1985. Her claims were resolved in the April 10, 1989, Findings of Fact, Conclusions of Law and Final Judgment. Perkins v. General Motors Corp., 709 F. Supp. 1487 (W.D. Mo. 1989).

On April 13, 1989, defendant moved for sanctions in the form of reasonable attorney's fees and other expenses against Perkins and her lead counsel, Gwen G. Caranchini,[1] citing seven particular instances of conduct by Perkins and/or Caranchini that it believes warrant sanctions under 28 U.S.C. Section 1927 and Rules 11 and 26(g), Federal Rules of Civil Procedure, or some combination of these. Shortly before defendant's motion was ready

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[1] G.M. does not seek sanctions against any of the other attorneys who entered their appearance for plaintiff.

to rule, separate counsel, Michael Childs, entered an appearance on behalf of Caranchini and filed further opposition to the Motion for Sanctions against Caranchini. By June 20, 1989, defendant's motion was fully briefed. A hearing on defendant's motion was set for July 13, 1989, "to ensure that each party has ample opportunity to present all facts in support of an in opposition to the motion. . . ." (Emphasis added.)

On July 12, 1989, Caranchini notified me that, upon advice of her attorney, she would not represent Perkins at the july 14, 1989, hearing. I contacted the other attorneys who had entered appearances on Perkins' behalf to ensure that they were aware of their responsibilities to Perkins. They told me that they were unable to work out satisfactory arrangements and, therefore, Perkins would represent herself.

At the July 14, 1989, hearing Perkins stated that, given Caranchini's refusal to represent her, Perkins wished to proceed pro se because she could not afford to hire another lawyer. Thus, at the July 14, 1989, hearing, Caranchini was represented by Childs and Perkins appeared pro se.

I. Standards for Imposing Sanctions

A. 28 U.S.C. Section 1927

Title 28 U.S.C. Section 1927 provides that:

> Any attorney or other person admitted to conduct cases in any court of the united States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

(1989 Supp.)

Section 1927 requires that the attorney act either in subjective bad faith or that the conduct itself be objectively vexatious. Burull v. First National Bank.

831 F.2d 788, 790 (8th Cir. 1987). Sanctions under Subsection 1927, unlike those under Rule 11, are discretionary, not mandatory. Id.

Sanctions under Section 1927 have been held appropriate in a variety of circumstances. See, e.g., Taylor v. Belger Cartage Service, Inc., 102 F.R.D. 172 (W.D. Mo. 1984 (union member's attorney unreasonably and vexatiously multiplied proceedings by filing and pursuing the case); Fisher v. CPC International Inc., 591 F. Supp. 228 (W.D. Mo. 1984) (all amounts incurred by defendants recoverable as excess costs under Section 1927 where action never should have been filed and counsel for plaintiff proceeded recklessly).

Rule 11

Rule 11, Federal Rules of Civil Procedure, which applies to pleadings,

motions and other pages, provided:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

ID. as amended April 28, 1983, effective August 1, 1983 (emphasis added).

The Advisory Committee Note to Rule 11 clarifies the purpose of the amendment:

> Since its original promulgation, Rule 11 has provided for the striking of

> pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. . . . Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . The new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

Rule 11 Advisory Committee Note, 97 F.R. D. 165, 198 (1983) (citations omitted) (emphasis added).

Rule 11 is "intended to be vigorously applied by district courts to curb widely acknowledged abuse resulting from the filing of frivolous pleadings and other papers." Adduono v. World Hockey Ass'n., 824 F.2d 617, 621 (8th Cir. 1987).

Under Rule 11, the signature of a party or attorney constitutes a certificate that the signer believes that after reasonable inquiry, 1) the pleading is well grounded in fact; 2) the pleading is

warranted by existing law; and 3) the pleading is not presented for any improper purpose.

The party or his attorney need not act in subjective bad faith or with malice to trigger a violation of Rule 11. Adduono, 824 F.2d at 621. Rather, an objective standard applies and the party or his attorney cannot argue "that their subjective 'good faith' (i.e., ignorance of the law or legal procedures) somehow excuses their actions." Kurkowski v. Volcker, 819 F.2d 201, 204 (8th Cir. 1987). The 1983 revision to Rule 11 "was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, by professional incompetence." Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987); see Rule 11 Advisory Committee Note, 97 F.R.D. at 198. "The standard is one of the reasonableness under

the circumstances." Rule 11 Advisory Committee Note, 97 F.R.D. at 198 (emphasis added).

The Advisory Committee Note sets forth, and the case law has further clarified, the factors a district court should consider in determining whether the attorney made a reasonable inquiry into the facts of a case:

> (W)hether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion or other paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient prefiling investigation; and whether discovery would have been beneficial to the development of the underlying facts.

Brown v. Federation of State Medical Boards, 830 F.2d 1429, 1435 (7th Cir. 1987); see Rule Advisory Committee Note, 97 F.R.D. at 199.

Sanctions may be warranted under the

"improper purpose" clause even if a competent attorney could form a reasonable belief as to the viability of the original complaint. If, for instance, the conduct of the litigation is "frivolous and abusive and not directed toward the 'just, speedy and inexpensive determination of (the) action,'" sanctions are appropriate. Bastien v. R.Rowland & Co., 116 F.R.D. 619, 621 (E.D. Mo. 1987), aff,d, Lupo v. R. Rowland & Co., , 857 F.2d 482 (8th Cir. 1988); see also Lucha, Inc. v. Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983).

Once the court has found a Rule 11 violation, imposition of sanctions is mandatory. See Adamson v. Bowen, 855 F.2d 560 (8th Cir. 1988).

C. Rule 26(g)

Rule 26(g), Federal Rules of Civil Procedure, which applies to discovery requests, responses to requests and

objections to requests, provides:

> The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification or reversal or existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
>
> If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification the party on whose behalf the request, response, or objection is made or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 26(g), as amended April 28, 1983, effective August 1, 1983. The Advisory

Committee Note describes the purpose of the rule:

> Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. . . .
>
> Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonably inquiry into the factual basis of his response, request or objection.
>
> The duty to make a "reasonable inquiry" is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. See the Advisory Committee Note to Rule 11. In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances.

Ultimately what is reasonable is a matter for the court to decide on the totality of the circumstances.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the clients has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.

. . .

Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it. This authority derives from Rule 37, 28 U.S.C. Section 1927, and the court's inherent power. The new rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances.

(Citations omitted.)

## II. Background

Defendant's motion must be considered against the background of pretrial and trial behavior of plaintiff and her counsel. Plaintiff's counsel seemed obsessed with converting a straightforward Title VII claim with unusual facts into a war against defendant and its attorneys. Her obsession led her to engage in personal, emotional attacks on opposing counsel.[2]

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[2] One recorded example of Caranchini's behavior is the following excerpt from a letter dated March 13, 1988, from Caranchini to Kelly and Yates, defendant's attorneys:

> Yet despite this record (or absence of record to support your positions), you and your client continue your always arrogant and ignorant posturing that Ms. Perkins i lying or hallunicating or both causing not only delay in the processing of this litigation but increasing the stress on this poor woman and her spouse. . . . Despite the posturing of Ms. McNamara-- who I can only describe as an inept, could (sic) blooded women (sic) who mouths what she hears

---

> from both of you--
>
> . . .
>
> I, therefore, urge you both to consider your ethical obligations, even if they are at cross purposes with Gage & Tucker's financial interests, or the interests of your client, in continuing to attempt to discredit Ms. Perkins and duly prolong this litigation.
>
> Quite frankly, I don't expect a response in terms of settlement. I do expect to receive one of Jack's all too pompous and arrogant letters which this office has learned to laugh at and use as a model of what to aspire to in letter writing skills. . . .

At the hearing on G.M.'s Motion for Sanctions, Caranchini agreed that she was emotionally involved in this case because it involved an emotional "woman's issue." She stated that she "liked her emotions:" they "don't make me a bad attorney."

A genuine belief in the righteousness of a client's cause can benefit a client. However, clients are not well served by attorneys who become so emotionally involved that they lose their ability to present effectively a client's cause. When emotion controls, distracts and substitutes for legal analysis and factual development, the client and the legal system are ill-served. Professional advice and objectivity are an attorney's stock in trade; emotional

During discovery, the inability of counsel to work together in processing this case resulted in numerous conferences both by telephone and in person to resolve what at the time often seemed to be frivolous disputes.[3]

Over time I realized that plaintiff's counsel bore the lion's share of the responsibility for the tension between

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cheerleaders are a dime a dozen.

[3] For example, because so many problems arose out of plaintiff's deposition, I requir that the deposition be completed in chambers. I hoped that the location of the deposition p my availability to resolve disputes would reduce the nonsense.

Generally, when disputes arose, I chose to push discovery to completion rather than attempt to make determinations of relative fault as we went along. I was concerned about aggravating the situation and making the case even more protracted and expensive. At times, I even suggested that possibly both parties were at fault in an effort to move forward and quiet the emotion-charged atmosphere.

counsel. Plaintiff's cause and the judicial system would have been far better served had the energy that went into these disputes between counsel been invested in focused, factual investigations directed to well conceived legal theories.

In summary the approach of plaintiff's attorney to this case exceed the most generous definition of "zealous advocacy" or of "hard fought, energetic and honest representation." Rather than devoting her efforts to the "just, speedy, and inexpensive" determination of this case, plaintiff's counsel engaged in abusive litigation tactics that delayed the processing of the case and increased the expense for both parties and the judicial system.

III. Sanctions Will Be Imposed Against Perkins and Caranchini Under Rule 26(g) and Against Caranchini under Section 1927 for Persisting in Pressing Factually

Unsupported Allegations Against Art Hester and For Doing So for an Improper Purpose.

Caranchini took the deposition of Art Hester, the G.M., Fairfax production manager, on September 3, 1987.

According to defendant's counsel (and not disputed by Caranchini), Caranchini telephoned counsel for G.M. on September 9, 1987, stating that her investigation following the deposition had determined that Hester had been "drummed" out of the United States Army based on allegations of sexual harassment and that he was allowed to resign his commission rather than be discharged. On September 11, 1987, Caranchini wrote a letter to G.M.'s counsel stating that "(it) has come to my attention Art Hester's departure from the military may have been the result of claims of sexual harassment against him, and/or as a result of his inability and unwillingness

to deal with women subordinates." Exhibit F to defendant's motion for sanctions at 1.

Caranchini continued to make references to Hester's alleged sexual misconduct until trial. For example, in her June 8, 1988, letter to G.M.'s counsel, Caranchini stated: "We are entitled to know whether Mr. Hester was engaged in sexual relations with Ms. Clark during the time she was in personnel. . . . Likewise any memorandums in either of these individuals' personnel files regarding their affair.'" Exhibit G at 2. In an October 14, 1988 letter, Caranchini warned: "Those individuals who you have indicated in the last several weeks you may call as witnesses also for the most part have serious background problems and will be subjected to some brutal cross examination." Exhibit E at 3. Implicit in this letter is the threat to make public

plaintiff's charges against Hester of sexual misconduct.

On March 2, 1988, in response to defendant's interrogatory requesting information on plaintiff's contention that G.M. hired people "known to GM to have lack of interpersonal relationship skills with women in the work place," Perkins stated under oath:

> 1) General Motors hired Arthur Hester as Fairfax plant manager when they knew he had significant problems with the United States Army over his sexual harassing women during his service in the Army, G.M. continues to retain him despite allegations by his wife and other individuals of his sexual escapades with women at the plant.

Exhibit H, answer to Interrogatory No. 10.

On October 28, 1988, Perkins stated under oath in an interrogatory answer that Hester was among "the particular managers of whom plaintiff has knowledge sexually harassing female employees." Exhibit 1, answer to Interrogatory No. 8. On the same

date, Perkins stated under oath that Hester "engages in sexual harassment at the plant, receives sexual favors from men at the plant, and sexually harassed when in the Army which caused him to resign from the service." Exhibit J, answer to Interrogatory No. 9.

Finally, at trial, Caranchini asked Timothy Danahy, personnel director at Fairfax, if he had received an anonymous letter containing allegations that Hester had an affair with Cinda Clark, another G.M. employee. Caranchini said that she wanted to show the "perception" of General Motors employees that a female employee had to "sleep her way to the top." G.M. objected arguing that these matters were irrelevant. I overruled G.M."s objection based on Caranchini's representation that later witnesses would establish a proper basis for the question.

G.M. seeks sanctions against Perkins and Caranchini under Rule 26(g) alleging that the interrogatory responses were signed without a reasonable basis in fact and for improper purposes and against Caranchini under Section 1927 for pursuing the attack on Hester for improper purposes.

Caranchini and Perkins argue that the "continual rumors about Mr. Hester's involvement with women" were substantiated by Fred White, Jr., Benjamin Staponski, Kathy Tierney and Trudy Lomonoco. Plaintiff's May 12, 1989, Response to Defendant's Motion for Sanctions at 17. They point to Ms. Howell's trial testimony that Hester would regularly tell her when he left the building during office hours that if his wife called, Howell was not to tell her that he had left the building.

Caranchini states that she requested that defendant produce Hester for a limited

additional deposition so that she could inquire about these matters but that G.M. refused to produce him. Caranchini and Perkins argue that G.M.'s refusal made G.M. "as responsible for this information going to trial as anyone." Response at 18. However, Caranchini never brought to my attention her desire to take a limited additional deposition of Hester on this issue. In a case where so much time was spent with counsel resolving discovery disputes, plaintiff's failure to raise with me her desire to redepose Hester establishes a lack of interest in investigating the truth of the alleged rumors.

Both Caranchini and Perkins now maintain that "the importance of the information regarding Mr. Hester is what was <u>perceived</u> by women and others at the plant regarding his sexual conduct, not

what was actual fact." Response at 18 (emphasis added). If all that mattered was the "perception" of Hester's alleged sexual harassment and extra-marital activities, Caranchini would have had no reason to request that G.M. produce Hester for his deposition on the subject. - Furthermore, Perkins' responses to the interrogatories do not state that she is just repeating rumor. Also, no evidence was presented that Perkins was aware of the rumors concerning Hester's departure from the military during the time she was allegedly experiencing a hostile environment. See Caranchini's September 121, 1987, letter to G.M.'s counsel (Exhibit F) in which she states that "information {about the circumstances surrounding Hester's departure from the military} has only come to light since the completion of his deposition." Finally, Caranchini did not

question Danahy at trial about whether Hester was perceived as a "womanizer"--she asked what facts Danahy knew about the issue.

Plaintiff and her attorney never produced any factual basis to support their personal attack on Hester. Caranchini failed to conduct an objectively reasonable inquiry into the charges made against Hester in interrogatory answers. Accordingly, I conclude that the allegations against Hester were intended to harass Hester and to increase the cost of this litigation for defendant.

Perkins signed the interrogatory answers. Caranchini signed them under the words "respectfully submitted." Therefore, because the interrogatory answers pertaining to Hester were "interposed" for an "improper purpose," both Perkins and Caranchini violated Rule 26(g).

Caranchini actions in pursuing the charges against Hester without adequate investigation multiplied the proceedings unreasonably and vexatiously in violation of Section 1927.

Therefore, Caranchini and Perkins will be required to reimburse G.M. for its reasonable expenses, including attorney's fees incurred in investigating the claims, preparing to respond to the charges against Hester at trial, preparing the Motion in Limine on this issue and participating in that part of the trial pertaining to those charges. Seventy-five percent of these expenses will be assessed against Caranchini and the balance against Perkins.

IV. G.M.'s Second Basis for Sanctions Will be Ruled in a Separate Order

All briefing on G.M.'s second basis for sanctions was filed under seal pursuant to the January 4, 1988, protective order.

Therefore, the order ruling this ground for sanctions will be issued separately under seal.

V. Sanctions Will be Imposed Against Caranchini Under Rule 11 for Making Factual Misrepresentations in Plaintiff's November 23, 1987, Motion For Leave to Amend Complaints

On May 27, 1986, Perkins filed suit in this court against G.M. alleging that G.M. negligently failed to maintain a safe work place free of sexual harassment (case No. 86-0665, "the negligence case"). On November 3, 1986, the negligence case was stayed pending adjudication of Perkins' worker's compensation claim in Kansas.

On May 28, 1986, (the next day_ Perkins filed suit in Jackson County Circuit Court against Spivey alleging assault, battery and intentional outrageous conduct (the "state court case").

"On January 20, 1987, plaintiff filed

her second suit in this court against G.M. alleging sexual harassment in violation of Title VII ("the Title VII case").

On February 24, 1987, plaintiff's two federal cases were consolidated on defendant's motion and the stay in 86-0665 was lifted.

On September 2, 1987, a scheduling conference was held at which Caranchini represented that no amendments to the pleadings or parties would be forthcoming. Accordingly, the September 14, 1987, scheduling order governing both cases in federal court stated that "no motion to join additional parties will be filed and no motion to amend the pleadings will be filed."

On November 23, 1987, Perkins filed a motion in the consolidated cases for leave to amend the complaints, to add Spivey as a defendant in the negligence case and to add

a claim for retaliatory discharge in the Title VII case. In her suggestions accompanying this motion, Caranchini stated that:

> At the time of the filing of (the state) lawsuit, Thomas Spivey was a citizen of Missouri and therefore could not be joined in the lawsuit filed against G.M.
>
> . . .
>
> Until the recent deposition of Spivey in the Federal case, which is not transcribed as of this date, it was not know that Spivey was no longer a resident of Missouri. Counsel for Perkins has only very recently been apprised by Spivey's counsel that Spivey is moving to Detroit, Michigan for a new job with G.M. (I)t was unclear until recently whether complete diversity would be preserved giving (sic) the unknowns about Spivey's residence. That problem has . . . been resolved.

Suggestions at 2, 4-5, 7.

Caranchini's statements regarding when she learned about Spivey's change of residence were incorrect. In the negligence case filed May 26, 1986,

plaintiff alleged: "7. Thomas S. Spivey has been transferred to the Lakewood Plant of GM in the environs of Atlanta, Georgia, effective June 1, 1986." This fact was confirmed in the October 30, 1986 deposition of Spivey:

Q. (By Caranchini) And where do you presently maintain your residence?

A. 5838 Trent Walk Drive.

Q. Could you spell that, please?

A. T-r-e-n-t, W-a-l-k, two words, Decatur, Georgia 30038.

. . .

Q. Do you maintain any other residence in any other states?

A. What do you mean by "maintaining a residence?"

Q. Do you have a home in any other state, a second home?

A. My wife has a home.

Q. Any where does your wife reside?

A. In Leawood, Kansas.

Q. Do you not live together?

A. We do not live together.

Exhibit D to G.M.'s December 7, 1987, Motion to Strike Plaintiff's Motion for Leave to Amend at 4.

In her May 12, 1989, opposition to G.M.'s motion for sanctions, Caranchini asserts without support that:

> {J}ust because Mr. Spivey was transferred to Lakewood, Georgia doesn't mean that he became a resident there. In fact, it appears that Mr. Spivey continued to be maintained on the roles {sic} of the employees of Fairfax even as late as July of 1988 and that he maintained as his residence, either his Gladstone address in Missouri or his wife's address at one point in time in Leawood, Kansas.

I have given Caranchini an opportunity to present the factual basis that she relies on for these statements but she has failed to present anything to support them. The only reasons le conclusion remaining is that she made an affirmative misrepresentation in her November 23, 1987,

Motion to Amend when she stated she had "only recently discovered" that Spivey was no longer a resident of Missouri

At the scheduling conference held on December 17, 1987, Caranchini offered other explanations for seeking to amend after the deadline. After I responded that Caranchini's reasons made little sense, Caranchini conceded that the real reason for seeking the later amendment was a change in strategy, not the reasons she advanced in the motion. Exhibit M to defendant's Motion for Sanctions at 31.

(A change in strategy, the real reason Caranchini sought a late amendment, is a legitimate reason for requesting leave to amend a scheduling order deadline has passed. Had the real reason been given by Caranchini, she would have been true to her oath as an attorney and her duty under Rule 11 even if the motion was denied.)

In addition, sanctions against Caranchini are appropriate under Section 1927. By misrepresenting the reasons why the relief she requested should be granted, Caranchini unreasonably and vexatiously multiplied the proceedings. Both my time and defense counsel's time were wasted in considering the spurious reasons given for plaintiff's motions.

Furthermore, Caranchini has not explained why her request to add the retaliation claim when it had not been presented to the EEOC complied with her duty under Rule 11. However, because some courts do not require amending an EEOC charge to assert retaliation, Caranchini will not be sanctioned for seeking leave to add this claim without first presenting it to the EEOC.

Accordingly, Caranchini will be required to pay to G.M. its reasonable

expenses incurred, including attorney's fees for 1) responding to plaintiff's November 23, 1987, Motion for Leave to Amend Complaint to add a party defendant; and 2) attending and preparing for that portion of the December 17, 1987, conference devoted to considering plaintiff's attempt to add a party defendant. No sanctions will be imposed on Perkins.

VI. Sanctions will be Imposed Against Caranchini Under Section 1927 and Rule 26(g) for Improper Handling of Fred White, Sr.'s Discovery

Fred white, Sr., was a member of upper management at G.M. Fairfax, who retired in August 1987, after a lengthy career with G.M. During the trial, Caranchini called White, Sr., as a witness for plaintiff and asked him whether he believed Perkins had been sexually harassed by Spivey. G.M. objected to this and related questions

claiming unfair surprise. Caranchini represented that White, Sr., if permitted, would testify that he believed Perkins because she had come to him complaining about Spivey and he had investigated her allegations.

On December 1, 1988, after 19 days of trial, I held a full day hearing at which lead counsel for both plaintiff and G.M. testified on the issue of whether the testimony of White, Sr., came as a surprise to G.M. At the conclusion of the hearing, I concluded that plaintiff had failed to reveal White's name in response to discovery requests, that to allow White to testify would be unfair and that plaintiff's request to reopen discovery after 19 days of trial would be denied. G.M. has now moved for sanctions against both Caranchini and Perkins for providing inaccurate and incomplete responses to

G.M.'s interrogatories and against Caranchini for vexatiously multiplying the proceedings.

On June 19, 1987, Caranchini took White, Sr.,'s deposition. On July 1, 1987, Caranchini wrote G.M.'s counsel accusing G.M.'s counsel of pressuring White, Sr.

> Likewise through Fred White, Jr. we understand Fred White, Sr., was pressured by G.M. to give the testimony he did in this case. If he did not give the testimony desired, it was made clear to him his early retirement was in jeopardy. . . . In fact, after Fred White, Jr.,'s deposition was finished, Scott went into the room in which Fred White, Sr., was waiting and informed him his son had just "unloaded" on the company and insinuated again Fred White, Sr., better watch what he said. As I was not in the room, I am unaware of the exact words conveyed to Fred White, Sr., Fred White, Sr., conveyed to Fred White, Jr. who conveyed to the undersigned the fact that Fred White, Sr., was being told he better play ball with the company "or else."[4]

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[4] Fred White, Jr., was a client of Caranchini who was suing G.M. at the time. "Scottie" is Paul Scott Kelly, one of G.M.'s attorneys.

A few days later Kelly took a recorded statement from White, Sr., in which he denied giving false testimony and denied being pressured.

By her own admission, Caranchini believed no later than January 1, 1988, that White Sr., had information about Perkins' allegations that he would eventually disclose to Caranchini and that it would be helpful to Perkins. Id. at 147. Caranchini thought that White, Sr.'s information was very important. "Oh, I thought it was a very important piece of information, but if I couldn't get him to say it, I felt there was nothing to do about it. I can't force him to give me information if he doesn't want to give it to me." Id. at 156.

When Caranchini asked White, Sr., about whether he had answered truthfully questions at his deposition about Perkins,

White Sr., "told me that he answered the questions truthfully in his deposition but that I had not asked the right questions." Id. at 131. When Caranchini asked him what the right questions were, White, Sr., responded, according to Caranchini, that "we at General Motors are taught to answer the question. When you get the right question you will get the right answer." Id. In late summer or early fall of 1988, White, Jr., told Caranchini that she was still not asking White Sr., the right questions "and that his father had information. . . ." Id. at 132. At a lunch with White, Sr., in late September or early October 1988, Caranchini testified that White, Sr., "said once again that he believed Perkins." Id. Caranchini asked White, Sr., if he had more specific information and he again said that if the right questions were asked, he would give

"the right answer." Id. at 133. On the night before White, Sr., was going to testify, White, Sr., and Jr., came to Caranchini's office. White, Jr., volunteered to ask the right question of his father which turned out to be "why do you believe Melody Perkins?" White, Sr., responded that Perkins had complained to him and he had made an investigation. Id. at 133-34.

Caranchini made no effort to depose White, Sr., to attempt to ask this obvious "right question." (In fact, the question is so obvious it supports the conclusion that Caranchini knew a good deal more about White, Sr., had to say than she now suggests.)

Also, Caranchini did not list White, Sr.'s, name in response to G.M.'s second interrogatories to plaintiff:

7. Do you contend that General

> Motors had actual knowledge that Tom Spivey "sexually harassed" and "raped" plaintiff as is alleged in plaintiff's complaints? If . . . the answer to this interrogatory is in the affirmative, identify by name and job title each employee of G.M. plaintiff contends had such knowledge and when such knowledge was acquired by that employee and state separately each and every fact upon which you base your contention.

(a) identify by name, job title or position and address each person known or believed by plaintiff to have knowledge of each fact recited in response to this interrogatory.

. . .

8. In addition to any claim of actual knowledge reflected in response to interrogatory 7 above, do you contend that General Motors should have known that Tom Spivey "sexually harassed" and "raped" plaintiff as is alleged in plaintiff;s complaints? If the answer to this interrogatory is in the affirmative, identify each employee of G.M. plaintiff contends should have known of such conduct and the date upon which plaintiff contends each such employee should have known of such conduct, and state separately each and every fact upon which you base your contention.

(a) Identify by name, job title or

> position and address each person known or believed by Plaintiff to have knowledge of each fact recited in response to this interrogatory.

(Emphasis added.) See Plaintiff's September 14, 1987, Answers to G.M.'s Second Interrogatories, Exhibit P to G.M.'s April 13, 1989, Motion for Sanctions; Plaintiff's March 8, 1988, Second Supplemental Answers, Exhibit R; and Plaintiff's October 18, 1988, Third Supplemental Answers, Exhibit S.

Caranchini claims that because she had no actual knowledge of White Sr.,'s alleged investigation until the revelation the night before trial, she had no obligation to furnish White, Sr.,'s name to G.M. in response to interrogatories When asked at the hearing by counsel for G.M. why she did not take White Sr.'s deposition, she stated that: 1) White Sr., stated that he preferred that she not ask him any further

questions about Perkins because it would require him to testify against G.M. and at that time he was not willing to do sp, Exhibit N at 122; 2) she was convinced that she could not get anything out of White, Sr., unless he wanted to give it to her, Id. at 130; and 3) because she felt that if she waited, sooner or later White, Sr., would come to her and give her the information. Id. at 148.

As I concluded at the December 1, 1988, hearing, Caranchini believed by early 1988 that White, Sr., had very significant information favorable to plaintiff. Because of White, Sr.'s upper management position at G.M., his testimony could have a devastating effect on defendant's case. Nevertheless, Caranchini did not reveal White, Sr.'s name in response to interrogatories that clearly asked for the name of every G.M. employee that plaintiff

believed had knowledge that could be imputed to G.M. (Caranchini's argument that she revealed White, Sr.'s name in response to other interrogatories does not absolve her from violating her duty to answer all discovery completely and truthfully.

I am convinced that Caranchini and the plaintiff intentionally did not furnish White, Sr.'s name in response to the crucial interrogatories and intentionally did not amend their answers to interrogatories 7 and 8 before trial in order to surprise G.M. at trial. (Although Perkins repeatedly supplemented her discovery responses in various respects after she knew enough to form the belief that White Sr., had important and favorable information, she never identified White, Sr., in response to appropriate questions before trial. See Exhibit N at 161-63 and

Exhibits P, Q, R and S to defendant's Motion for Sanctions.)

Accordingly, Caranchini and Perkins violated Rule 26(g) in that they signed discovery responses that were not consistent with the Federal Rules of Civil Procedure because they were not complete and accurate. They will be ordered to pay defendant's reasonable expenses incurred because of this violation including reasonable attorney's fees. (The record in this case amply supports the conclusion that Perkins knew that Caranchini believed White, Sr., had significant information that would be of great assistance to plaintiff's case. Caranchini and Perkins worked closely together throughout this case. It defies belief that Caranchini would not have made Perkins fully aware of the important witness that Caranchini believed she had in White, Sr.

Also, Caranchini will be sanctioned under Section 1927 for unreasonably and vexatiously multiplying the proceedings. She will be assessed the excess costs and attorney's fees reasonably incurred because she unreasonably did not disclose White, Sr.'s, name in answer to Interrogatories 7 and 8 resulting in a multiplication of the proceedings.

Accordingly, because of her violation of 28 U.S.C. Section 1927 and Rule 26(g), Caranchini will be required to pay G.M. its reasonable expenses including attorney's fees incurred for 1) time spent in court on November 10, 1988, concerning the intended testimony of White, Sr.,; 2) time spent on G.M.'s Motion in Limine regarding the testimony of White Sr.; and 3) time spent preparing for and at the December 1, 1988 hearing, on the Motion in Limine. Perkins will be assessed 15 percent of G.M.'s

reasonable expenses for gnawingly answering untruthfully and incompletely the interrogatories.

VII. Sanctions Will Not Be Imposed Against Caranchini Under Section 1927 for Proffering Plaintiff's Social Work Expert

At trial, Caranchini called Karen C. Wagner, an experienced social worker with an extensive background in women's issues, and attempted to qualify her as an expert. In plaintiff's March 7, 1988, Third Supplemental Answers to Defendant's First Interrogatories to Plaintiff (Exhibit T to G.M.'s April 13, 1989 Motion for Sanctions), plaintiff named Wagner as an expert to testify to the following: 1) her definition of sexual harassment based on a layman's understanding of the EEO guidelines; 2) that an environment such as the one at G.M. Fairfax has an adverse impact on female employees; 3) that there

are specific steps that employers can take to create an environment free from sexual harassment which G.M. failed to take; 4) that Perkins experienced sexual harassment and G.M. management was unresponsive to her concerns; 5) that G.M.'s approach to allegations of sexual harassment causes women to believe that a) their allegations will not be believed, b) nothing will be done to correct the sexual harassment at Fairfax; and/or c) they will be retaliated against for complaining; and 6) that homosexual women often hide their homosexuality from co-workers because this knowledge is often used against them.

After G.M. informally advised plaintiff that G.M. believed many of the subjects Wagner was planning to testify about were improper, G.M. filed two Motions in Limine on October 17, 1988, regarding Wagner: 1) a motion to exclude expert

opinions on credibility and 2) a motion to exclude Wagner's testimony entirely because it lacked a reliable and unbiased foundation and because it consisted of inadmissible legal conclusions.

During the pretrial conference I made clear to both parties that no witness would be permitted to testify about the law on sexual harassment. However, I reserved ruling on the motion until I could hear Wagner's qualifications and hear the questions plaintiff's counsel would ask Wagner.

Caranchini called Wagner at trial and spent an entire day attempting, unsuccessfully, to qualify her as an expert on these issues. Later in the trial, when Wagner did not reappear, Caranchini moved to strike Wagner's testimony in its entirety.

G.M. moves for sanctions against

Caranchini under Section 1927 alleging that her persistence in attempting to qualify Wagner as an expert to testify about matters that were improper unreasonably and vexatiously multiplied both the discovery and trial proceedings.

Caranchini contends that sanctions are not appropriate because, although I refused to allow Wagner to testify on these issues, Wagner has been qualified as an expert witness on substantially similar issues in other cases. Thus, Caranchini argues that she had no reason to believe that she could not qualify Wagner in this case. In support of this contention, Caranchini provided a portion of the trail transcript from Moffett v. Gene B. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985), and portions of Wagner's deposition in that case in which Wagner discusses generally her experience as a consultant and expert witness. The

most significant portion of Moffett transcript is at pages 283-84 where the court qualified Wagner as an expert on specific issues after hearing her testimony about her experience counseling victims of sexual harassment:

> The Court: She's testified primarily about the affects of harassment on individual workers and the appropriate response for employers to make to activities of harassment; and with respect to the matters about which I understand her to have testified, it's absolutely clear to me that she is an expert.
>
> Now the question of what weight I give to her testimony on the various issues in the case or whether I, in fact, find that the plaintiff will prevail under various theories is entirely a different matter; but as I understand the matters she has testified to, that is, the impact of harassment on the job on individual employees and the appropriate response that employers should make to harassment on the job, primarily sexual in her testimony. . . . I think she's clearly qualified to testify about the matters that I understand her to have testified to.
>
> . . .
>
> I think her expertise is established

> generally with respect to harassment on the job site, primarily sexual harassment and the effects of that on employees and the method of appropriate response by employers.
>
> Mr. James F. Beatty: Thank you.
>
> The Court: And I would only consider her testimony on those issues.

(Emphasis added.)

Although Wagner has acted as a consultant or a non-testifying expert in other cases, she was only qualified to testify at trial as an expert in one other case--Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988). Wagner's February 12, 1988, deposition, Vol. II at 165. In her deposition, Wagner was asked:

> Q. And what was the opinion you were asked to give in (the Broderick) case?
>
> A. The opinion was the kind of hostile environment that the individual experienced, and the kind of retaliation she experienced as a result of not acquiescing, to that hostile environment.

Q. And what was your testimony in that case?

A. That she, in fact, experienced a hostile, environment, and, in fact experienced retaliation because of her unwillingness to acquiesce to that environment.

Id. at p. 166, II. 1-11.

In the Broderick opinion, Wagner's testimony was referred to as follows:

> Ms. Karen Wagner, a social worker with broad experience, was the plaintiff's other expert. She testified generally on the stress effects of sexual harassment on women in plaintiff's position, with particular reference to the plaintiff's hostile working environment and the effect on the plaintiff and her associates in having to work in such an environment.

685 F. Supp. at 1273 (emphasis added). The opinion does not state whether Wagner's opinion about the stress effects was based on a hypothetical question or whether Wagner was qualified to opine on whether plaintiff had in fact been subjected to a sexually hostile work environment.

Caranchini argues that my failure to grant the Motions in Limine was the real cause of the entire day being wasted while Caranchini tried to qualify Wagner. As I made clear on the record, I was skeptical about whether Wagner could be qualified to give any relevant testimony but decided to give plaintiff the opportunity to try.

Although Caranchini's day long attempt to qualify Wagner as an expert, was in retrospect, a waste of time, I am not convinced that Caranchini unreasonably or vexatiously multiplied the proceedings, Caranchini had reason to believe that Wagner would be qualified as an expert on at least some of the issues and neither her refusal to withdraw Wagner in response to G.M.'s concerns nor her attempts at trial to qualify Wagner as an expert Warrant Section 1927 sanctions. Accordingly, no sanctions will be imposed upon Caranchini

for proffering plaintiff's social work expert.

VIII. Sanctions Will Be Imposed Against Caranchini Under Section 1927 for Misrepresenting Plaintiff's Evidence Regarding Work Environment Witnesses

Perkins claimed that she was a victim of both quid pro quo sexual harassment and a sexually hostile work environment. At trial, Caranchini called numerous witnesses from the G.M. Fairfax plant to testify about their perception of the work environment and about sexual harassment directed at them. G.M. objected to the relevancy of the experiences of these witnesses because there was no evidence that Perkins was aware of their experiences or that their work environment was the same as plaintiff's. Caranchini argued that the testimony of the work environment witnesses was relevant to establish the

ineffectiveness of G.M.'s overall complaint procedure and the generally hostile environment.

G.M. moves for Rule 11 and Rule 26(g) sanctions against Caranchini and Perkins for listing witnesses in interrogatory answers and witness lists who had no personal knowledge of facts relating to Perkins' claim. G.M. argues that this action demonstrates an inadequate factual inquiry by Perkins and Caranchini and an improper purpose that needlessly increased the costs of litigation.

Caranchini and Perkins oppose entry of sanctions arguing that they had a good faith belief that I would permit witnesses to testify about the general sexually hostile work environment in light of the unsettled case law on this issue. Specifically Caranchini and Perkins rely on Hicks v. Gates Rubber Co., 833 F.2d 1406,

1415 (10th Cir. 1987).

Hicks was cited in Hall v. Gus Const. Co., 841 F.2d 1010, 1015 (8th Cir. 1988), for the proportion that "evidence of sexual harassment directed at employees other than plaintiff is relevant to show a hostile work environment." However, the court also cited Jones v. Flagship International, 793 F.2d 714, 721 n.7 (5th Cir. 1986), for this proposition. The court summarized the holding in Jones as follows: "Incidents of sexual harassment reported by other females bear on plaintiff's claim only if there is evidence that such incidents affected plaintiff's psychological well-being." Hall, 841 F.2d at 1015.

The issue before the Hall court involved the testimony of a co-plaintiff about the work environment experienced by all plaintiffs. Because hostile work environment harassment presupposes either

interference with the plaintiff's work performance or a hostile work environment for the plaintiff, work environment evidence must be connected to plaintiff's working conditions. See Hall, 842 F.2d at 1013, 1015.

Accordingly, I ruled that plaintiff's witnesses would be allowed to testify about their perception of the work environment at G.M. if there was a showing that 1) the "environment" the witness would testify about was the same work environment Perkins experienced; and 2) Perkins knew about the other witnesses' experiences while working at Fairfax.

After being advised of this ruling, Caranchini repeatedly told me that the testimony of the work environment witnesses would be "tied in to plaintiff" and that it would become clear that "their experience impacted directly on Perkins' environment."

Relying on this representation, I allowed Caranchini to present the testimony of eight work environment witnesses. Most of them were never "tied to plaintiff" either by their own testimony or by Perkins' testimony.

Because the law in this circuit on this issue is unclear, it is inappropriate to sanction Perkins or Caranchini on the grounds that they failed to make an adequate factual or legal investigation into this issue before I established the conditions for receiving this testimony.

G.M. also moves for Section 1927 sanctions against Caranchini for multiplying the proceedings so as to unreasonably and vexatiously increase costs by misrepresenting to the court that the work environment witnesses would be "tied in to plaintiff."

Caranchini does not respond to this

allegation other than to reiterate her argument that general work environment witnesses could have been proper if I had followed Hicks. However, as shown by pages 12-14 of plaintiff's Second Supplemental Answers to Defendant's Second Interrogatories to Plaintiff (Exhibit A to G.M.'s October 17, 1988, Motion in Limine regarding evidence of sexual harassment involving persons other than plaintiff), Perkins did not learn about several of her witnesses' allegations of sexual harassment, i.e., Mari Patterson, Connie Ownes, Mary Stumpf and Janet Lisko-Ray, until after she filed this case. Therefore, the experience of these witnesses could not possibly have affected plaintiff's perception of her work environment because she did not know of these experiences while working at Fairfax. Consequently, Caranchini could not have

connected these witness to plaintiff as she represented she would. it is not unreasonable to expect that after discovery and trial preparation counsel would know the facts well enough so that a representation of this type would be accurate. Were it not for Caranchini's representation, I would not have allowed the witnesses to testify. As a result, she unreasonably multiplied the proceedings. Accordingly, Caranchini will be sanctioned pursuant to Section 1927 and will be required to pay G.M. its reasonable expenses incurred in examining and listening to witnesses Patterson, Owens, Stumpf and Lisko-Ray.

Because Caranchini is being sanctioned only for her representation that she would tie the witnesses to plaintiff, when she knew she could not, Caranchini will not be required to pay G.M. its expenses for time

spent investigating or deposing plaintiff's work environment witnesses. Also, Caranchini will not be required to pay G.M. for time spent preparing the Motion in Limine on the work environment witnesses. No sanctions will be imposed against Perkins.

## IX. Sanctions Will be Imposed Against Caranchini Under Rule 11 and Against Caranchini Under Section 1927 for filing the Recusal Motion

After a year and a half of discovery, a bench trial on Perkins' Title VII claims began on November 1, 1988, and continued until January 9, 1989. On January 11, 1989, I announced from the bench that Perkins had not persuaded me that her version of her affair with Spivey was credible and, therefore, defendant would prevail. I stated that written Findings of Fact and Conclusions of Law would be issued at a later date.

On April 3, 1989, nearly three months after the trial ended, but before my written findings were issued, Perkins filed a motion supported by Caranchini's affidavit asking me to recuse and declare a mistrial. The Motion to Recuse, pursuant to 28 U.S.C. Sections 144 and 455, had two principal grounds--one concerning my wife and one concerning the law clerk who worked with me on this case.

In her affidavit, Caranchini stated:

> 1. That since this court's ruling in the above captioned matters on January 11, 1989, there have been numerous articles in the local newspapers regarding the prospective merger of Gage & Tucker, counsel for defendant, and the law firm of Lathrop, Koontz, in which this court's wife, Ms. Karen Iverson is a partner.
>
> 2. Prior to those articles in the newspapers the undersigned had not knowledge of the potential merger of those two law firms.
>
> 3. That discussions by the undersigned since those articles appeared with both Gene Owens and Jack Yates, partners with Gage & Tucker,

confirm that such discussions of merger are presently ongoing and have been ongoing since prior to the announcement in the newspaper (although the exact dates of the commencement of those discussions is unknown by the undersigned).

4. That Ms. Karen Iverson has as her specialty labor law for management and is known in the legal community as a specialist in defending civil rights and wrongful discharge claims against companies and therefore has an interest in the outcome of any case in this District which would have impact on the defense of civil rights claims and wrongful discharge claims.

5. That the proposed merger of the two law firms would create one law firm in which Ms. Iverson would be a partner, having a financial interest in fees and distributions of profits from clients of the new law firm, including the defendant herein, General Motors; and would also have an interest in maintaining as one of the new firm's clients, General Motors, a major client if not source of income to Gage & Tucker presently, and any law firm with which Gage & Tucker may merge.

6, Gage & Tucker has had General Motors as a client in the area of labor law for a substantial period of time and there is no indication that GM would not continue to have the new law firm represent it in this area, especially given the augmented labor

staff that would be available to GM from Lathrop Koontz['s} own labor area, including Ms. Iverson.

7. That during the trial of this matter, Ms. Iverson was present in the courtroom on at least one occasion observing the proceedings, including during the examination of Mr. Thomas Spivey.

8. That during the trial of this matter, this court informed counsel for the parties in chambers, that Ms. Terry Mills (sic), this court's law clerk on the pending matters, had been offered and accepted employment with a law firm in Detroit, Michigan which did work for General Motors, and as a result thereof, there may be the appearance of impropriety; the court offered to remove Ms. Mills(sic) from the further handling of the case, which the parties and their counsel respectfully declined. This court did not offer to recuse itself, however.

9. That based upon the above, it is clear Ms. Iverson will have a financial as well as legal interest in the outcome of the case; and, based upon this Court's prior conduct in offering to remove his law clerk who was somewhat similarly situated to the Court's present situation, plaintiff's counsel believes there is a sufficient basis in fact that this court has a personal bias and or prejudice in favor of General Motors and/or that the facts are such that pursuant to 28 U.S.C. Sec. 455 this court must

> disqualify himself from further disposition of this matter.

On April 10, 1989, I issued an Order Denying Plaintiff's Motion for Recusal reserving the right to supplement the reasons stated therein, which I did by order of May 3, 1989.

G.M. now moves for Rule 11 sanctions against both Caranchini and Perkins for Section 1927 sanctions against Caranchini.

Caranchini's proffered reasons for recusal smack of bad faith for a t least three reasons. First, the motion was untimely. My wife has been a partner at Lathrop, Koontz practicing employment law since before this case was filed and Caranchini knew this fact since before the case was filed. Therefore, her allegations of my bias due to my wife's "general interest" in employment litigation were untimely. However, assuming it was the

rumor of merger that triggered Caranchini's concern, the motion was still untimely. Her explanation for not filing the motion from January to April is that she took a vacation, consulted with other attorneys and did various other things. If she truly believed the situation was as grave as she represented it to be, she would not have delayed so long.

Regarding my law clerk's employment, the following conference took place in chambers on November 21, 1988, in the presence of both Perkins and G.M.'s corporate representative:

> The Court: Within the last half hour, my law clerk, Terry Milne, accepted employment next year with a law firm of Dickinson, Wright, Moon, Van Dusen and Freeman in Detroit, Michigan. . . . Terry also tells me that they do occasional legal work for General Motors. They are representing General Motors in two matters right now, but that General Motors is not considered a significant client, not in their top 50 clients.

Now, Ms. Milne has been on this case for--since she came to work with me and has a significant background developed through it. If anybody is concerned in the slightest about the fact that she has accepted a job with a firm that is presently representing General Motors in two matters, I will certainly be glad to listen and we will consider having Mr. Schram (sic), my other law clerk take over as the law clerk assigned to this case.

Ms. Caranchini: None whatsoever, Your Honor.

Mr. Kelly: We have none, Your Honor.

The Court: All right. . . . I wanted to raise it and give you all a chance to comment about it because it is something--it would have affect obviously on the efficiency of which I operate in this case, but that is a small price to pay for--if anybody is concerned about the appearance of the matter, we will make the change immediately. . . .

Ms. Caranchini: None, sir, whatsoever.

The Court: Ms. Perkins, did you have any concern about that?

Ms. Perkins: No, sir, I don't.

Plaintiff's delay until April 3, 1989, in moving for recusal suggests other

motivation than genuine concern about Ms. Milne's prospective employment.

The second indication of bad faith in the motion is that it lacks any merit whatsoever. Caranchini's argument that I should disqualify myself simply because my wife happens to work in the employment law field was unsupported by any authority or even sensible argument. Caranchini's conclusion that a law firm merger is a reality, supported only by an affidavit that says discussions are taking place, is faulty. Similarly, Caranchini's suggestion that I recuse because my law clerk accepted a position with a large firm in Detroit that occasionally represents G.M.--after Caranchini and Perkins both unequivocally stated they had no concerns about allowing that clerk to continue to work on the case--suggests other motivation than genuine concern. Not surprisingly, the motion

contained no legal authority even suggesting that recusal was appropriate in this situation.

The final indication of bad faith on the part of Perkins and Caranchini arises from facts that were set forth in the April 10, 2989, order denying the recusal motion. For example, on April 3, 1989, the date of the recusal motion, Perkins had pending in another division of this court a case against Thomas Spivey that was going to trial sometime during the three-week period beginning April 17, 1989. As a result of a telephone call from Caranchini to my office, she knew that I planned to issue the findings and conclusions in this case in early April. Caranchini knew that if my findings were issued before the Spivey trial began, the chance that my decision in this case would have some preclusive effect on that case would be increased. As I

stated in the April 10, 1989, order, "a reasonable person in possession of all the facts would conclude that this (recusal) motion was a last ditch, desperate attempt to delay the issuance of findings and conclusions in this case until after plaintiff's case against Thomas Spivey can be tried in another division of this court." Id. at 4.

For all these reasons, I am convinced that the recusal motion was filed without a reasonable or even arguable basis in fact or law. Thus, both Perkins and Caranchini will be sanctioned under Rule 11. Caranchini will also be sanctioned for the same conduct under Section 1927. Accordingly, Caranchini will be required to pay G.M.'s reasonable expenses including attorney's fees incurred in responding to plaintiff's Motion for Recusal.

## X. Conclusion

Therefore, it is hereby ORDERED that:

1) sanctions will be imposed against Perkins and Caranchini as stated in this order;

2) within 30 days from the date of this order, G.M. shall file and serve upon Caranchini and Perkins a detailed claim for its reasonable expenses consistent with this order. This claim should include a description of the work done, the time spent and the reasonable hourly rate or value of the services rendered;

3) within 20 days after G.M. files its claim, Caranchini and/or Perkins may file a statement commenting upon: a) the reasonableness of claims by G.M.; and b) whether and to what extent imposition of the requested sanctions would create an unreasonable financial hardship on them or their dependents. Caranchini and Perkins should specifically identify any

disagreement about the reasonableness of what G.M. claims was done for it or about the reasonableness of the monetary value of those services claimed by G.M.;

4) within 15 days after Caranchini and Perkins file the response required in paragraph 3), G.M. may file a reply; and

5) any party to these proceedings, including Caranchini, may in their submissions comment on the appropriateness of the allocation of responsibility as between Perkins and Caranchini.

/s/

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
February 26, 1990.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DISTRICT

| | | |
|---|---|---|
| MELODY PERKINS, | ) | |
| | ) | |
| Plaintiff, | ) | No. 86-0665-CV-W-9 |
| | ) | |
| v. | ) | |
| | ) | |
| GENERAL MOTORS CORP, | ) | |
| Defendant. | ) | |

ORDER DENYING JOINT MOTION TO VACATE
ORDER OF FEBRUARY 26, 1990

The parties request that I vacate the order dated February 26, 1990, granting in part and denying in part Defendant's Motion for sanctions against plaintiff and her lead attorney. The joint request is part of the parties' agreement to settle this case.

I have considered the parties' joint motion and the parties statements at the conference held on July 2, 1991.

As a general matter, I do not believe that I should vacate an order absent a

showing that the order was erroneous or for some extraordinary reason. I continue to believe that the February 26, 1990, order properly resolves the issues raised by defendant's Motion for Sanctions. Therefore, for me to vacate this order could suggest that I have second thoughts about the order which is not the case.

Finally, no extraordinary reason has been suggested that would justify vacating the order.

For the foregoing reasons, it is ORDERED that the parties' joint motion to vacate the February 26, 1990, Order Granting in Part and denying in Part Defendant's Motion for Sanctions is denied.

s/s

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri
July 5, 1991

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2825WM

Melody Perkins, *
*
Appellant, *
*
v. *
*
General Motors Corp., *
*

No. 91-3550WM

Appeals from the United States District Court for the Western District of Missouri

In re: Melody Perkins; *
Gwen G. Caranchini, *
*
Petitioners. *

Submitted: January 9, 1992

Filed: May 22, 1992

Before WOLLMAN, MAGILL, AND BEAM,* Circuit Judges

MAGILL, Circuit Judge.

* Chief Judge Arnold presided when this case was heard and later recused himself. Judge Beam substituted for Chief Judge Arnold and the case was resubmitted March 11, 1992, on the record and tape of oral argument.

Plaintiff below Melody Perkins and her attorney Gwen G. Caranchini appeal an order of the district court refusing[1] to vacate sanctions. Appellants also seek mandamus relief ordering the district court to lift the sanctions. Appellants argue the sanctions must be lifted because the underlying action on which the sanctions were based has been settled by the parties. The request for mandamus relief is denied and the district court's order imposing the sanctions is affirmed.

I.

Melody Perkins sued General Motors

---

[1] The Honorable D. Brook Bartlett, United States District Judge for the Western District of Missouri.

Corporation in 1986 for sexual harassment. The substantive claims, which are not longer at issue, alleged the company subjected Perkins to sexual harassment in the workplace in violation of Title VII. Perkins also attached a diversity state claim that GM negligently retained an employee that sexually harassed Perkins. The district court granted summary judgment on the state claim and proceeded to trial on the Title VII claim. After a sex-week bench trial, Perkins lost her Title VII claim.

After the trial concluded, GM moved the court for sanctions against Perkins and attorney Caranchini. The district court granted the motion in part and levied sanctions against Perkins and Caranchini for various abuses during trial and

discovery.[2]

In an earlier appeal of Perkins' substantive claims, this court upheld the district court's Title VII verdict, but reversed the district court's summary judgment denial of the negligence claim and remanded for trial on that issue. Perkins v. Spivey, 911 F.2d 22 (8th Cir. 1990). Meantime, the district court set a hearing for June 27, 1991, to conclude arguments on the attorney's fees requested by GM under the sanction order. One day before this hearing, the parties settled the underlying case. As part of the settlement agreement, GM joined Perkins and Caranchini in moving the court to lift the sanction order. On July 5, 1991, the court refused to lift the

---

[2] The district court sanctioned Caranchini under Fed. R.Civ. P.11 and 26(g), and under 28 U.S.C. Section 1927 (1988). Perkins was sanctioned under Rule 26(g).

order.

A. Writ of Mandamus

Appellants seeks a writ of mandamus ordering the district court to lift the sanctions. The writ of mandamus is an extraordinary remedy that should be utilized only in those "exceptional circumstances . . . amounting to a judicial usurpation of power." In re Lane, 801 F.2d 1040, 1042 (8th Cir. 1986) quoting Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam)). A federal court may issue a writ of mandamus only when the appellant has established a "clear and indisputable right" to the relief sought, the court has a nondiscretionary duty to honor that right, and appellant has no other adequate remedy. Lane, 801 F.2d at 1042.

Appellants have met none of these criteria. As we make clear infra, the

district court had no duty to lift the sanction order under Willy v. Coastal Corp., 112 S.Ct. 1076 (1992), and Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2247 (1990). The district court's decision, therefore, was discretionary. Finally, since we have concluded infra that the district court's sanction order is appealable, appellants have an adequate remedy. The motion for a writ of mandamus, therefore, is denied.

B. Jurisdiction

Appellants contend that the district court lost jurisdiction to enforce the sanctions when the parties settled the case. Since the court retained no jurisdiction over the underlying case, appellants argue, the district court was required to dismiss the sanctions as part of the whole case.

In Willy, 112 S.Ct. 1076, the Supreme

Court held that a district court is empowered to award Rule 11 sanctions even though it was later found to have lacked subject-matter jurisdiction over the underlying claim.

> A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.

Id. at 1080. Maintaining jurisdiction over the sanctions is even more appropriate in this case. It is undisputed that the district court had subject-matter jurisdiction over the case when the sanctions were ordered. Jurisdiction over the underlying claim was lost later. The district court order appellants want set aside is collateral to the merits. Id. A federal court may consider collateral

issues after an issue is no longer pending. Id.

Moreover, appellants' argument misinterprets the role of sanctions. The purpose of sanctions goes beyond reimbursing parties for expenses incurred in responding to unjustified or vexatious claims. Rather, sanctions are "designed to punish a party who has already violated the court's rules." Willy, 112 S.Ct. at 1081. The interest in having rules of procedure obeyed does not disappear merely because an adversary chooses not to collect the sanctions.

Respondent[3] argues that since the district court never determined the monetary value of the sanctions, there has been no final appealable order from the

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[3] GM has elected not to participate in this appeal and was dismissed from the action by order of this court. Respondent refers to Judge Bartlett.

district court. We disagree. The case below has been settled by the parties and is concluded in its entirety. After briefing and a hearing, the district court on February 26, 1990, issued its order sanctioning Perkins and Caranchini. This order, however, was not a final appealable order because it prescribed procedures to determine the amount of money due under the sanctions. As part of the settlement agreement reached the day prior to the sanction hearing, GM withdrew its motion for sanctions and joined appellants in a motion to drop the sanction order. The court refused and upheld the sanctions in an order issued on July 5, 1991.

We find that the July 5, 1991, order made final the February 26, 1990, sanction order. While the district court did not assess a monetary penalty, GM informed the district court that it had agreed as part

of the settlement not to collect any monetary sanctions. Therefore, it was reasonable for the district court to issue the sanction order without monetary penalty. The failure of the district court to go through the motions of assessing a dollar amount to penalties GM had agreed not to pursue does not prevent the sanction order from becoming final. The finality requirement should be given a "practical rather than a technical construction." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

Moreover, we find compelling policy reasons for exercising jurisdiction over this appeal. If an attorney is unable to appeal a sanction order after the underlying case has been settled, the attorney is left with no avenue of challenging the sanction order. The law encourages parties to settle disputes. An

attorney must be free to settle cases when settlement is in the client's best interest. The refusal to grant jurisdiction over an appeal of sanctions after the underlying suit has been settled thrusts a personal conflict upon the attorney--by settling a case in the client's interest he may have to forfeit a personal right to appeal the sanctions levied against him. See Cheng v. GAF Corp., 713 F.2d 886, 889-90 (2d Cir. 1986.

Appellants also argue that since GM has agreed not to collect monetary sanctions, there is no longer an adversarial relationship and the sanction order is moot. We disagree. Although GM moved the court for sanctions, it was the district court that imposed them. Appellants are entitled to bargain with adversaries to drop a motion for sanctions, but they cannot unilaterally bargain away

the court's discretion in imposing sanctions and the public's interest in ensuring compliance with the rules of procedure. See Kleiner v. First Nat'l Bank of Atlanta. 751 F.2d 1193, 1200 (11th Cir. 1985). Contra Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990).

C. Sanction Order[4]

After full briefing and oral argument by the parties, the district court assessed various sanctions against Perkins and attorney Caranchini. The district court found that the tactics of plaintiff's

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[4] Appellants contend the sanctions are not before this court because this court on August 23, 1991, temporarily stayed briefing on the appeal pending resolution of the mandamus petition. This court, however, on November 14, 1991, entered an order setting a briefing schedule and oral argument in both case Nos. 91-2825 (the appeal) and 91-3550 (the mandamus petition).

attorney" exceeded the most generous definition of zealous advocacy or hard fought, energetic and honest representation. Rather than devoting her efforts to the just, speedy, and inexpensive determination of this case, plaintiff's counsel engaged in abusive litigation tactics that delayed the processing of the case and increased the expense for both parties and the judicial system." Perkins v. General Motors Corp., 129 F.R.D. 655, 660 (W.D. Mo. 1990) (quotations omitted). The district court awarded sanctions based on five separate violations.

First, the district court sanctioned Perkins and Caranchini under Rule 26(g)[5]

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[5] The court shall impose a sanction upon the party and/or her attorney when a false discovery document is signed. Before signing a pleading, an attorney must ensure that:

and Caranchini under 28 U.S.C. Section 1927 (1988)[6] for persistently pursuing unsupported factual allegations against GM employee Art Hester during discovery. The

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{T}o the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R.Civ.P. 26(g).

[6] "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. Section 1927 (1988).

unsupported allegations included charges that Hester had been "drummed" out of the United States Army on charges of sexual harassment. Plaintiff also stated under oath in an interrogatory answer that she had personal knowledge that Hester had engaged in sexual harassment and other sexual misconduct at the plant. Id. at 660-61. The court concluded that plaintiff and her attorney produced no factual basis to support the personal attacks on Hester, failed to undertake an objectively reasonable inquiry into the charges made in interrogatory answers, and that the allegations were intended to harass Hester and to increase the costs of litigation for the defendant." Id. at 662.

Second the district court sanctioned

Caranchini under Rule 11[7] and Section 1927 for falsely stating in a November 1987 motion to amend her complaint that she did not discover until recently that GM employee Thomas Spivey lived out of state and could be joined in the suit without destroying diversity of citizenship. The court found that Caranchini knew at least as early as October 1986 that Spivey lived

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[7] Rule 11 provides:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation.

FED. R.Civ.P. 11.

in Georgia.[8] Further, the court found that Caranchini failed to produce any evidence supporting her explanation that Spivey maintained a second residence in Missouri or Kansas. Caranchini later admitted that she sought the late amendment because of a change in strategy. The court concluded that Caranchini should be sanctioned for filing false pleadings as to the reason for the delay in filing her motion to join Spivey. Id. at 663-64.

Third, the court sanctioned Perkins and Caranchini under Rule 26(g) and Caranchini under Section 1927 for failing to disclose in discovery that former GM employee Fred White, Sr., would be asked to testify about his supposed belief that Perkins' claims were true. Despite

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[8] In a September 1987 scheduling conference, both parties stated that no motions to join parties or amend pleadings would be forthcoming.

repeated discovery requests by GM for plaintiff to identify all GM employees with purported knowledge of the alleged incidents, plaintiff refused to disclose White's name until they called him at trial and questioned him about his belief in Perkins' claim. The court concluded that Perkins and Caranchini intentionally failed to disclose White's name in order to surprise GM at trial. Id. at 666.

Fourth, the court sanctioned Caranchini under Section 1927 for misrepresenting to the court the testimony of several witnesses. Caranchini called numerous witnesses to testify as to the work environment at the GM plant. Specifically, the witnesses testified as to their perceptions of sexual harassment at the plant and as to incidents of sexual harassment directed at them. The court allowed the witnesses to testify on the

condition that: (1) the work environment about which they testified was the same as that experienced by Perkins, and (2) Perkins knew of the other witnesses' experiences at the plant. Caranchini assured the judge that all the witnesses would be "tied in to plaintiff." Perkins admitted in discovery, however. that she did not become aware of the witnesses' allegations until after the suit was filed. Therefore, the witnesses' allegations could not have been affected Perkins' perception of the plant environment when she worked there and Caranchini could not possibly have tied them to Perkins. The court concluded that if he had known Perkins was unaware of these witnesses' allegations while she was at the plant, he would not have allowed the testimony. Therefore, he sanctioned Caranchini for unreasonably multiplying the proceedings. Id. at 669.

Finally, the court sanctioned Caranchini under Rule 11 and Section 1927 for filing a motion to recuse the judge three months after the judge decided the case and released his oral ruling to the parties, but before written findings were issued. The recusal motion primarily was based on two grounds: (1) rumors that the defense firm in the case would merge with a law firm at which the judge;s wife was a partner, and (2) that one of the judge's law clerks had accepted a position with a law firm that did some work for GM. The court found that the motion smacked of bad faith for several reasons.

First, the court found the motion untimely. Caranchini argued in the motion that the judge's wife would benefit from a ruling for GM because she defended termination suits as part of her practice. The silliness of this argument goes without

comment, but in any event, as the judge noted, parties were aware well before the case was filed that the judge's wife held this position. As to the charge of potential financial conflict as a result of the rumored law firm merger, the judge concluded the motion was filed in bad faith because it came three months after Caranchini became aware of the rumor. Caranchini's recusal motion also focused on the law clerk's acceptance of employment with a firm that represented GM. Immediately after accepting the job offer, the clerk informed the judge. Within thirty minutes after the clerk accepted employment with the firm, the judge called all the parties into his chambers and notified them of the situation. The judge completely explained the potential conflict and offered to sever the clerk from all ties with the case. None of the parties,

including Caranchini, said they had any concerns about the development.

Second, the judge concluded that the recusal motion was made in bad faith because it "lacked any merit whatsoever" and "(n)ot surprisingly . . . contained no legal authority even suggesting that recusal was appropriate in this situation." Id. at 671-72 (emphasis in original). Finally, the judge determined the motion was filed in bad faith to delay the issuance of the written findings from the original trial, which Caranchini knew would be released in early April. Beginning on April 17, Perkins was set to go to trial in the case against Spivey. "Caranchini knew that if my findings were issued before the Spivey trial began, the chance that my decision in this case would have some preclusive effect on that case would be increased." Id. at 672.

We review the district court's award of sanctions under an abuse of discretion standard. Cooter & Gell, 110 S.Ct. at 2461. After reviewing the record, we find the sanctions were well grounded in fact and law and did not constitute an abuse of discretion.

II.

For the foregoing reasons, the judgment of the district court is affirmed. The motion for mandamus relief is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

No. 92-337

# In the Supreme Court of the United States

OCTOBER TERM, 1992

MELODY PERKINS, PETITIONER

*v.*

GENERAL MOTORS CORP.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the district court was required to vacate a prior order imposing sanctions because the parties settled the underlying case and requested that the district court vacate the sanctions order.

2. Whether the court of appeals violated the Due Process Clause of the Fifth Amendment by deciding petitioners' appeal as well as their petition for a writ of mandamus.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No. 92-337

MELODY PERKINS, PETITIONER

*v.*

GENERAL MOTORS CORP.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1c-23c, is reported at 965 F.2d 597. The orders of the district court, Pet. App. 1a-72a, 1b-2b, are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 22, 1992. The petition for a writ of certiorari was filed on August 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Melody Perkins sued General Motors Corporation ("GM") in the United States District Court for the Western District of Missouri. Pet. App. 2c-3c. She alleged that GM violated Title VII of the Civil Rights Act by subjecting her to sexual harassment in the workplace and violated state law by negligently retaining an employee who had sexually harassed her. *Id.* at 3c. The district court granted summary judgment for GM on the negligence claim and proceeded to trial on the Title VII claim, ultimately finding in favor of GM. *Ibid.* Petitioner Perkins appealed both the grant of summary judgment and the decision on the Title VII claim. *Id.* at 4c.

2. GM moved in the district court for sanctions against petitioner Perkins and her attorney, petitioner Caranchini. Pet. App. 3c. The district court granted the motion in part, and ordered sanctions imposed against petitioners under 28 U.S.C. 1927 and Rules 11 and 26(g), Fed. R. Civ. P., for various abuses during trial and discovery. Pet. App. 71a, 4c n.2. The district court sanctioned petitioners for making unsupported allegations against a GM witness for an improper purpose, *id.* at 18a-26a, making factual misrepresentations in connection with a motion for leave to amend the complaint, *id.* at 27a-34a, improperly handling discovery with respect to a particular witness, *id.* at 34a-46a, misrepresenting evidence regarding witnesses testifying as to petitioner Perkins' work environment, *id.* at 54a-61a, and filing a frivolous motion for recusal of the district judge, *id.* at 61a-70a. The court ordered GM to submit a detailed claim for reasonable attorney's fees and expenses caused by petitioners' conduct. *Id.* at 71a-72a.

3. Before the district court had determined the amount of sanctions to award, the court of appeals decided Perkins' appeal on the merits, upholding the district court's Title VII verdict, but reversing the district court's grant of summary judgment on the negligence claim and remanding that claim for trial. See *Perkins* v. *Spivey*, 911 F.2d 22 (8th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991). The parties then settled the case. Pet. App. 4c. As part of the settlement agreement, GM joined petitioners in moving to dismiss the case and to vacate the sanctions order. *Ibid.* The district court dismissed the underlying case, but refused to vacate the sanctions order. *Id.* at 1b-2b. The district court did not set an amount for the sanctions award.

4. Petitioners appealed the district court's sanctions orders. Pet. App. 2c. Petitioners later moved to stay the appeal pending application for a writ of mandamus; the court of appeals granted the motion. *Id.* at 12c n.4. Petitioners thereafter filed a petition for a writ of mandamus, arguing that the district court was required to vacate its prior order imposing sanctions because the court did not have jurisdiction to impose sanctions. *Id.* at 2c.

On November 14, 1991, the court of appeals entered an order, which contained captions for both the appeal and the mandamus petition. The order began: "This matter is before the Court on a Petition for a Writ of Mandamus, as well as a notice of appeal from the district court's orders of February 26, 1990, and July 5, 1991." App., *infra*, 1a. The order set a briefing and oral argument schedule, providing due dates for "Petitioners/appellant's brief and Appen-

dix." *Id.* at 2a. The order also granted GM's request to be dismissed from the proceedings, directed the clerk to allow the district court judge to participate, and requested that the United States Attorney enter an appearance on behalf of the district judge. *Ibid.*

Apparently believing the November 14 order did not apply to the appeal, petitioners in their brief addressed only the issue of whether the district court had jurisdiction to impose sanctions. Pet. 10. In contrast, the government (representing the district court judge) addressed the merits of the district court's imposition of sanctions, as well as the jurisdictional issue, in its brief before the court of appeals. See App., *infra*, 4a-6a.

5. The court of appeals denied the petition for a writ of mandamus and affirmed the district court's order imposing sanctions. Pet. App. 23c. Relying on this Court's recent decision in *Willy* v. *Coastal Corp.*, 112 S. Ct. 1076 (1992), the court held that a district court has jurisdiction to impose sanctions even though it does not have jurisdiction over the underlying claim; thus, the district court was not required to vacate its prior order imposing sanctions. Pet. App. 6c-8c. The court of appeals also rejected petitioners' argument that GM's decision not to seek sanctions required the district court to vacate its order, stating that "[t]he interest in having rules of procedure obeyed does not disappear merely because an adversary chooses not to collect the sanctions." *Id.* at 8c. The court held that "[a]ppellants are entitled to bargain with adversaries to drop a motion for sanctions, but they cannot unilaterally bargain away the court's discretion in imposing sanctions and the pub-

lic's interest in ensuring compliance with the rules of procedure." *Id.* at 11c-12c.

Having denied the petition for a writ of mandamus, the court of appeals turned to the appeal of the orders imposing sanctions. The court first rejected petitioners' argument that the appeal was not before the court: "This court, however, on November 14, 1991, entered an order setting a briefing schedule and oral argument in both case Nos. 91-2825 (the appeal) and 91-3550 (the mandamus petition)." Pet. App. 12c n.4. The court of appeals then held that the district court did not abuse its discretion in imposing sanctions against petitioners. See *id.* at 12c-23c.[1]

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners argue that a district court may not impose sanctions on its own motion when it does not have jurisdiction over the underlying case. Pet. 27-28. This argument is a combination of two distinct theories. The first is that a district court loses jurisdiction to impose sanctions when the underlying case settles; the second is that a district court lacks jurisdiction to impose sanctions unless a party to the underlying case seeks sanctions. Because neither of these theories is correct, petitioners' argument is unavailing.

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[1] The court also rejected our argument that the district court's order was not a final appealable order because the court had not determined the amount of sanctions to award. Pet. App. 8c-9c.

a. A district court has jurisdiction to impose sanctions for violation of rules regulating the conduct of the courts even when the court loses, or never had, jurisdiction of the underlying case.

In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), this Court held that a district court has jurisdiction to impose sanctions under Rule 11, Fed. R. Civ. P., after the plaintiff voluntarily dismisses the complaint. The Court reasoned: "[T]he imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated." 496 U.S. at 396. Because the Rule 11 issue is collateral, and "[i]t is well established that a federal court may consider collateral issues after an action is no longer pending," *id.* at 395, the Court concluded that "a voluntary dismissal does not deprive a district court of jurisdiction over a Rule 11 motion." *Id.* at 409.

In *Willy* v. *Coastal Corp.*, 112 S. Ct. 1076 (1992), this Court held that the district court had power to impose sanctions under Rule 11 although the court of appeals later determined that the district court never had jurisdiction over the underlying case. Relying on *Cooter & Gell*, the Court reasoned that, because an order imposing sanctions presents a "collateral issue," issuance of such an order "does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction." 112 S. Ct. at 1080. "The interest in having rules of procedure obeyed," the Court noted, "does not disappear upon a subsequent determination that the court was without subject-matter jurisdiction." *Id.* at 1081.

*Cooter & Gell* and *Willy* establish that settlement of the underlying case does not deprive a district court of jurisdiction to impose sanctions. Moreover, as the court of appeals in this case correctly observed: "Maintaining jurisdiction over the sanctions is even more appropriate in this case [than in *Willy*]. It is undisputed that the district court had subject-matter jurisdiction over the case when the sanctions were ordered. Jurisdiction over the underlying claim was lost later." Pet. App. 7c.

b. Because a court's jurisdiction over the underlying case does not affect the court's jurisdiction over the sanctions issue (as petitioners apparently recognize, see Pet. 26-27), petitioners are left to contend that a district court does not have jurisdiction to impose sanctions when the opposing party in the underlying case does not seek sanctions. Pet. 27-28. This argument is flawed in several respects.

First, Rule 11 itself states: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion *or upon its own initiative*, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction." Fed. R. Civ. P. 11 (emphasis added). The rule "made explicit" the authority of courts to impose sanctions on their own motion "in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties." Fed. R. Civ. P. 11 advisory comm. note. The Rule and Advisory Committee note clearly indicate that district courts have authority to impose sanctions without the motion of a party.

Second, *Willy* and *Cooter & Gell* do not support the distinction drawn by petitioners. In neither case did the Court state, or even hint, that a district

court's jurisdiction over the sanctions issue depends upon the involvement of the opposing party from the underlying case. The Court in *Willy* simply stated that a Rule 11 order "implicates no constitutional concern" and "does not raise the issue of a district court adjudicating the merits of a 'case or controversy' over which it lacks jurisdiction." 112 S. Ct. at 1080.

Third, petitioners' argument reflects a misunderstanding of the nature of sanctions. As this Court stated in *Willy* and *Cooter & Gell*, conduct meriting sanctions is an abuse of the judicial system. See *Willy*, 112 S. Ct. at 1080; *Cooter & Gell*, 496 U.S. at 396. Thus, disputes over whether the rules have been violated and, if so, what sanction to impose are between the court and the party who violated the rules. In this regard, the sanctions determination is similar to a criminal contempt adjudication, see *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911) ("proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause"), in which a court may "make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated." *Cooter & Gell*, 496 U.S. at 396; see also *United States* v. *United Mine Workers*, 330 U.S. 258, 294 (1947) ("Violations of an order are punishable as criminal contempt even though * * * the basic action has become moot.").[2]

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[2] Contrary to petitioners' assertion, Pet. 28, the district court in this case specifically noted that petitioners' conduct constituted an abuse of the judicial system. The court's order imposing sanctions stated that "plaintiff's counsel engaged in abusive litigation tactics that delayed the processing of the case and increased the expense for both parties *and the*

2. Petitioners complain, Pet. 30-37, that the court of appeals violated the Due Process Clause when the court, after staying petitioners' appeal pending a decision on the petition for a writ of mandamus, subsequently issued an order setting a consolidated briefing and argument schedule for the appeal and petition and then decided the appeal and the petition together. This claim does not warrant review.

a. Petitioners' failure to brief the merits of the district court's imposition of sanctions is the result of their own neglect. The court of appeals issued a briefing and oral argument order with captions for both the appeal and the mandamus petition. See App., *infra*, 1a. The first sentence of the order stated: "This matter is before the Court on a Petition for a Writ of Mandamus, *as well as a notice of appeal from the district court's orders of February 26, 1990, and July 5, 1991.*" *Ibid.* (emphasis added). The briefing schedule set dates for "Petitioners/appellant's brief and Appendix" and "Petitioners/appellant's Reply Brief." *Id.* at 2a.

Petitioners ignored the plain import of the court of appeals' order. Instead, they simply assumed that the "short briefing schedule and quick time period" meant that only the mandamus issue was involved. Pet. 31. By contrast, contrary to petitioners' assertion, Pet. 10, respondent did address the appeal of the district court's sanctions order: Our brief for the respondent judge included a section arguing that the district

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*judicial system.*" Pet. App. 17a (emphasis added). The district court recounted numerous instances in which petitioners' conduct unreasonably multiplied the proceedings. *Id.* at 16a-17a, 26a, 33a, 45a, 60a.

court did not abuse its discretion in entering its orders. App., *infra*, 4a-6a.

In sum, petitioners cannot legitimately complain that the court deprived them of an opportunity to address the merits of the sanctions orders.

b. In any event, a court of appeals does not violate the Due Process Clause by granting summary affirmance without full briefing and argument. Appellate courts long have been free to give a matter full consideration after determining that formal briefing and oral argument are not necessary. See, *e.g.*, *Taxpayers Watchdog, Inc.* v. *Stanley*, 819 F.2d 294, 297-298 (D.C. Cir. 1987); *Sills* v. *Bureau of Prisons*, 761 F.2d 792, 793-794 (D.C. Cir. 1985).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 91-2825WM

MELODY PERKINS, PLAINTIFF-APPELLANT

*vs.*

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE

---

Appeal from the United States District Court
for the Western District of Missouri

---

No. 91-3550WMKC

IN RE:
MELODY PERKINS and GWEN G. CARANCHINI,
PETITIONERS

---

Petition for Writ of Mandamus

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This matter is before the Court on a Petition for a Writ of Mandamus, as well as a notice of appeal from the district court's orders of February 26, 1990, and July 5, 1991. The Court has completed its initial review of the matter and has determined that disposition of the case would be aided by further briefing and oral argument. The clerk of the Court is directed to set this matter for oral argument during the

Court's January, 1992, session in St. Louis, Missouri. Counsel will be notified of the exact time and date of the oral argument after the January calendar has been established.

It is further ordered that General Motors Corporation is dismissed from these appellate proceedings. The district court judge, however, is an interested party, as the matters raised by appellant and her counsel affect the integrity of the court. As a result, the clerk should set a briefing schedule which allows the district court judge to file a response. The district judge shall request the United States Attorney to represent the Court with respect to the integrity of its orders.

The following briefing schedule is hereby established:

| | |
|---|---|
| Petitioners/appellant's brief and Appendix | December 2, 1991 |
| Respondent's brief and Appendix | December 20, 1991 |
| Petitioners/appellant's Reply Brief | December 31, 1991 |

In light of the January, 1992, sitting, no extensions can be granted.

Miscellaneous case number 91-8149 has been regularly docketed as case number 91-3550.

November 14, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 91-2825WM

MELODY PERKINS, ET AL., PLAINTIFFS-APPELLANTS

*vs.*

GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE

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Appeal from the United States District Court
for the Western District of Missouri

---

No. 91-3550WMKC

IN RE:
MELODY PERKINS and GWEN G. CARANCHINI,
PETITIONERS

---

Petition for Writ of Mandamus

---

ANSWER AND BRIEF OF RESPONDENT

---

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F. *The District Court Did Not Abuse Its Discretion.*

Should this Court find jurisdiction for the direct appeal or determine that the request for mandamus is properly before it, both the appeal and the petition should be denied on the merits. In order to grant mandamus, this Court must find a clear abuse of discretion or usurpation of judicial power. *Kerr, supra*; *Iowa Beef Processors, supra.* With respect to the appeal, orders concerning sanctions are reviewable under a single "abuse of discretion" standard. *Cooter, supra.*

1. *The Violations Order of February 26.*

When the district court entered the violations order, the court resolved issues properly presented to it by GMC. Perkins and Caranchini do not claim that they were denied procedural due process. They had notice and were heard, even to the extent of an oral argument, which is not necessarily required for due process under Rule 11. *GJB Assoc., Inc. v. Singleton,* 913 F.2d 824 (10th Cir. 1990); *Hudson v. Moore Business Forms, Inc.*, 898 F.2d 686 (9th Cir. 1990).

Since the sanctions issues were justiciable, and since procedural due process was provided, the only question for appellate review is whether the district court abused its discretion in partly granting and partly denying GMC's original motion. The February 26 order, and the whole record, demonstrate that respondent carefully considered the conduct complained of, the circumstances surrounding it, and the arguments of Perkins and Caranchini against the imposition of sanctions.

Perkins and Caranchini do not claim that respondent applied the wrong factual standard, which is objective reasonableness measured at the time the alleged offending action was taken by the party or attorney. *Cooter & Gell, supra; Mann & GG Mfg., Inc.*, 900 F.2d 953 (6th Cir. 1990). There is no factual basis in this record even suggesting that respondent was motivated by vindictiveness or prejudice, as Caranchini claims. There is simply no evidence from which a reasonable person could find that the district court acted in excess of or in abuse of its discretion when it entered the February 26 violations order. Consequently, this Court should affirm the violations order.

2. *The July 5 Denial Order*

In order to grant mandamus with respect to the denial order, this Court would have to find that respondent abused its discretion in refusing to vacate the February 26 order at the request of the parties. Again, the record does not provide any basis for concluding that the district court abused its discretion. The district court explained that it found no error in the February 26 order as it was entered. Respondent further found that the parties had not suggested any extraordinary reason which would justify vacating the earlier order.

The transcript of the July 5 chambers conference shows that the parties were given an opportunity to present such extraordinary cause, and they did not do so. Respondent's concern about allowing parties to "clean up" the record after a case is settled is reflected in the transcript of the July 5 conference. The record reflects no abuse of discretion in the court's order of

July 5. No relief is warranted with respect to the entry of that order.

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